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Isaac Parker 1805

A

COMPENDIUM

OF THE

Law of

EVIDENCE.

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PREFACE.

HAVING not unfrequently observed the difficulties under which the most experienced labour when points of evidence suddenly arise at *Nisi Prius*, I thought that I could not more usefully employ the leisure hours of a professional life, than in an endeavour to simplify and explain the rules which govern this most important part of our Law. In order to do this, so as to render the service I wished to my profession, it appeared to me to be absolutely necessary to compress the matter I should offer for its acceptance, into as little space as possible; and with that view I determined to exclude every thing which was not *practically* useful; but at the same time to keep in view the *principles* on which the *practice* was founded, and by an attention to which alone it can be understood.

I presume my reader to be already acquainted with the general rules of pleading, and to know the evidence necessary to support particular issues: these questions are generally considered before the trial; or if not, there are not wanting *Nisi Prius* books already to explain them: but what degree of evidence will prove a particular fact, and who is competent to give it, are questions which are often to be decided on in a moment, without the opportunity of consulting

ing books, or referring to the authorities. To remove, in some degree, these difficulties, is the object of the following work.

The reader will perceive, that with the addition of the modern cases, the greatest part of the Section on *Records*, is little more than a new arrangement of *Lord Chief Baron Gilbert's* Law of Evidence; a work which it is to be lamented, never received the last corrections of its author (many parts of it being evidently mere memoranda, intended by him for future arrangement and correction,) but which nevertheless in its present state is so excellent, that as far as relates to this part of the Law of Evidence, which may be considered as coeval with the law itself, it must form the basis of every subsequent work on the subject. The greatest part of this section consisting of clear admitted principles, I thought it better to refer to *Gilbert* only, or to the late *Mr. J. Buller's* book (from which I have derived considerable assistance,) than unnecessarily to crowd the text with useless authorities.

The extension of commerce, and the various concerns of mankind, have rendered very large additions necessary to the section which treats of *Public Writings not of Record*; and that on *Private Instruments* is entirely new modelled, for rejecting all the learning on the *profert* and *pleading* of deeds, as foreign to the plan of my work, I have confined my observations wholly to the *proof* of them and other private instruments, on which little is to be found in any former book of this nature.

The

The chapter on *Parol Testimony*, also, is in a great measure new; for the rules of evidence in this respect have been so much altered, and so much light has been thrown on them by modern decisions, that, comparatively, little is to be collected from ancient books that is satisfactory on the subject. It was said by *Lord Mansfield*[1] with that force of expression peculiar to great minds, who exercise the right of thinking for themselves before they assent to the authority of others,—"we "do not sit here to take our rules of evidence from "*Siderfin* or *Keble*." Rejecting those cases which were not supported by *principles*, that great Judge established a *system* for his successors to follow, and *competence* and *credibility*, so frequently confounded together, are now accurately defined, and well understood.

In the section on *Interested Witnesses*, I have endeavoured to confine the text as much as possible to *principles*; but to render the work useful in *practice*, I have added a Digest of the more modern Cases, so classed together as to be easily referred to when similar points arise.

Some few decisions being frequently referred to as leading cases, on particular parts of the Law of Evidence, I have added them by way of Appendix, that the reader may have an opportunity of referring to them, when he has not the advantage of his library; and those cases which being in MS. are not already open to the profession, are also printed at

[1] Blac. 366.

length,

length, some by way of note in the page where cited, others in the Appendix at the end of the work.

Though of small size, this work has been attended with a considerable portion of labour; reference has been had to all the cases cited, and no reliance placed on Digests, Abridgments, or former Treatises on the subject; still I fear that, in the attempt to blend and consolidate so many cases, some errors may have escaped my observation; for these I solicit the indulgence of a liberal profession, and shall gratefully receive any hint from the candid and friendly critic for their correction.

Michaelmas Term, 1801.

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Of the General Rules of Evidence.

IN almoſt every caſe which preſents itſelf for the conſideration of a Court of Juſtice, ſome fact is diſputed by the litigating parties, and the truth being unknown to thoſe who are to decide, recourſe muſt be had to the teſtimony of others. As this is corroborated or oppoſed, by the good or bad character of the witneſſes, by their concurrence or contradiction of each other, or by the circumſtances and probabilities of the caſe, the mind of the hearer arrives at a greater or leſs degree of certainty; and, weighing theſe conſiderations together, is enabled to pronounce on the truth or falſhood of the fact in diſpute. As to the *weight* which may belong to any evidence which is admitted by the Court, it muſt ever depend more on *reaſon* than *authority* to decide; but even here

ſome lines have been drawn, and ſome known rules eſtabliſhed: as far as decided caſes have defined theſe rules, it is the peculiar buſineſs of the Lawyer to know, and abide by them; and ſo far only have I, in the following Eſſay, conſidered this part of the ſubject.

The *forms* of evidence have more confined and certain limits; they depend not ſo much on fixed principles, as on arbitrary regulations; different countries, and even different courts in the ſame country, have their ſeveral rules, the knowledge of which is moſt eſſential to every man who is at all concerned in the practice of the courts where they prevail. The chief object of this work is to collect and explain the rules adopted by the common Law of England.

Affirmative to be proved, Bul. N. P. 298.

The party who makes an *affirmative* allegation, which is denied by his adverſary, is in general required to prove it, for the *negative* not admitting in its nature of direct proof, the party who denies a fact, is not called upon to give that evidence which can only be circumſtantial, till ſome evidence has been given to prove the fact alleged: but in caſes where a man is charged with not doing an act, which by the law he is liable to do, a different rule prevails, for the law preſumes that every man does his duty to ſociety, until the contrary is proved,

Gilb. Law Ev. 149.

and,

and, therefore, in an information againſt Lord Halifax, for refuſing to deliver up the Rolls of the Auditor of the Exchequer, the Court required the proſecutor to prove the negative, viz. that he did not deliver them up. Bul. N. P. 298.

Another rule is, that the evidence muſt be applied to the particular fact in diſpute, and therefore no evidence not relating to the iſſue, or in ſome manner connected with it can be received; (a) nor can the character of either party, Evidence muſt be confined to the iſſue.

(a) In the caſe of the *Dean* and *Chapter* of *Ely* v. *Warren*. 2 *Atk.* 189. The Lord Chancellor ſaid, the general rule of Law was, that evidence of the cuſtom of neighbouring manors ſhould not be permitted to ſhew the cuſtom of another manor, but that the rule was not ſo univerſal as not to be varied in ſome inſtances; as in Mine Counties, Derbyſhire, &c. the Courts of Law have admitted evidence with regard to profits of Mines, &c. out of other manors, where they are analogous, or ſimilar, to explain or corroborate the cuſtom in queſtion.

Thus, in the caſe of the *Duke of Somerſet* v. *France*. 1 *Stra.* 654, where the queſtion was, whether the *Duke of Somerſet* being tenant for life by marriage ſettlement of ſeveral manors in the county of Cumberland, was entitled on the death of his lady, to whom a prior eſtate for life was limited, to certain fines from the tenant of the manor, evidence was admitted of the cuſtom of other adjoining manors in ſuch caſes.

The ſame rule of evidence was adopted in the following caſe—

Wall and others v. *Attorney General and Duke of Devonſhire*, *B. R. Eaſt* 1. *George* 3. *M. S.* This was an iſſue directed by the houſe of Lords (*vide* 5 *Bro. Parl. Caſes*, 1.) to try what part of the land one got dreſſed and made merchantable in Wimſher, within the King's field, ought to be deemed *Smitham*, according to the cuſtom,

party, unleſs put in iſſue by the very proceeding itſelf, be called in queſtion, for every cauſe is

cuſtom, &c. And 2dly, Whether ſuch Smitham was of right exempted from the payment of duty of lot.

On the part of the plaintiffs, they offered to go into the cuſtoms of ſeveral other diſtricts within the King's Fee, as to the uſe of an inſtrument called a Riddle (which they wanted to ſet up as the Gauge, to aſcertain what was Smitham); but it being admitted that the ſeveral liberties were governed by diſtinct laws and cuſtoms, the Court refuſed it, and Lord Mansfield ſaid, the caſe of the *Duke of Somerſet* v. *France*, *Stra.* 654. was only as to the quality of the eſtate, but that the cuſtom of a neighbouring manor had never been admitted in any other inſtance.—*Wilmot*, *J.* the reaſon of its being there admitted was, that the cuſtom of paying a fine upon the death of every lord was a political inſtitution that prevailed in all the Northern Counties bordering upon Scotland, and intended to ſecure the fidelity of the tenants, and make it their intereſt to protect their lord, and that it is called *Border Law*. But that the cuſtom of other manors was never admitted, but in caſe of ſome general law or quality, and not where the queſtion was upon particular cuſtoms; and he mentioned a caſe, *(Mich. 7 G. 2.)* where the queſtion was, whether the Office of Regiſter of an Arch-Deaconry was grantable for two lives, and they offered to give evidence of the uſage of other Arch-deaconries within the ſame dioceſe, but refuſed; for it was ſaid that was only as to a particular cuſtom, and not like the Border laws; and a caſe was there cited, where, on a queſtion as to a cuſtom in a manor of the Dean and Chapter of Wells, the cuſtom of the next adjoining manor, which alſo belonged to the Dean and Chapter, was refuſed to be admitted as evidence.

N. B. Defendants, in a good meaſure, reſted their defence upon the unreaſonableneſs of the cuſtom, the riddle being of a certain ſize, and it being proved that the miners might dreſs their ore, where, and how they pleaſed, and might break it down, ſo as all would paſs through the riddle, and become Smitham; Lord Mansfield,

is to be decided on its own circumſtances, and not to be prejudiced by any matter foreign to it. Therefore, in an ejectment by the heir at law, to ſet aſide a will for fraud and impoſition committed by the defendant, he ſhall not be permitted to call evidence to prove his general good character.

Goodright dem Faro v. Hicks, Winton Sum. Aſſiz. 1789. cor. Buller J. B. N. P. 296.

field, in ſumming up, told the Jury, that if they believed the witneſſes, they muſt find for the defendants, as the cuſtom was unreaſonable, uncertain, and plainly calculated to introduce fraud, and therefore not a good or legal cuſtom.

The caſe alluded to by Mr. J. Wilmot, was that of *Ruding* v. *Newall*, 2 *Stra.* 957.

So in *Furneaux* v. *Hutchins*, *Cowp.* 807. The Court held, that on an iſſue upon the cuſtom of tything in the manor of A. evidence that ſuch a cuſtom exiſted in the adjacent pariſhes was not admiſſible, but had the iſſue been on the general cuſtom of the whole county, it would.

Entries of admiſſions into *ſeparate* companies in the ſame town, as the Company of Carpenters, the Company of Plaiſterers, &c. are good evidence to be left to a Jury of the exiſtence of an aggregate corporation conſiſting of the ſeveral trades. The *Company of Carpenters, &c.* v. *Hayward* Doug. 374.

Where A. drew a Bill of Exchange on B. payable to a fictitious payee or order, and indorſed it in the name of ſuch payee, which B. accepted; in an action on the Bill by an innocent indorſee, for a valuable conſideration againſt B. evidence was admitted of irregular and ſuſpicious tranſactions and circumſtances relating to other Bills drawn by A. on B. payable to fictitious payees, and accepted by B. though none of thoſe circumſtances and tranſactions had any *apparent* relation to the Bill in queſtion; in order to draw an inference either that B. at the time he accepted the Bill in queſtion, knew the name of the payee to be fictitious, or that he had given an authority to A. to draw ſuch Bills on him. *Gibſon* v. *Hunter*. *D. P.* 2 *H. Blac.* 288.

But,

Roberts v. Malſton, per Willes. C. J. Hereford, 1754. Bul. N. P. 296. Elſam v. Faucet, 1. Eſp. Caſ. N.P. 562.

But, in an action for criminal converſation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a baſtard before marriage; becauſe, by bringing the action, her huſband puts her general behaviour in iſſue, but he cannot prove any inſtance of her miſconduct, ſubſequent to the act of adultery.

Bul. N. P. 296.

So in caſes where the defendant's character is put in iſſue by the proſecution, the proſecutor may examine to particular facts, for it is impoſſible without it to prove the charge. Yet there is one caſe of that ſort in which the proſecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant, and that is where a man is indicted for being a common barretor: and the reaſon is, ſuch indictments are commonly againſt attorneys, whoſe profeſſion it is to follow Law Suits; and it is difficult to draw the line between that and acting as a barretor, therefore it makes it neceſſary for him to know what particular facts are to be given in evidence, that he may be prepared to ſhew that he was fairly employed in thoſe caſes, and acted in his profeſſion. But in other criminal caſes, the proſecutor cannot enter into the defendant's character unleſs the defendant enable him to do ſo by calling witneſſes in ſupport of it, and even then the proſecutor cannot examine to

particular

particular facts, the general character of the defendant not being put in iſſue, but coming in collaterally.

The ſubject of proof being aſcertained by the preceding rules, the next thing which muſt be attended to is that the beſt evidence the nature of the caſe will admit of, be produced; for if it appears that better evidence might have been brought forward, the very circumſtance of its being withheld furniſhes a ſuſpicion that it would have prejudiced the party in whoſe power it is, had he produced it. Thus, if a contract is in writing, in exiſtence, and in the cuſtody of the party, no parol teſtimony can be received of its contents; if a ſubſcribing witneſs has atteſted the execution of a deed, he, and he alone, is competent to prove it, becauſe no other perſon can be ſo fully acquainted with the circumſtances of the caſe, as he who was preſent at the tranſaction. But when the Law requires the *beſt* evidence, it does not require *all* the evidence which might be given; if there are two ſubſcribing witneſſes to a deed, or a dozen preſent at the making of a verbal contract, the evidence of any one, while uncontradicted, is ſufficient; for the circumſtance of the others not being produced, does not incline the mind to ſuſpect that they would not have ſworn the ſame, as the other party might have called them, had he not known

The beſt evidence to be produced.

that

that the fact depoſed by one, was conſiſtent with the truth.

Hearſay therefore not allowed.

The law never gives credit to the bare aſſertion of any one, however high his rank, or pure his morals; but always requires the ſanction of an oath: It further requires his perſonal attendance in Court, that he may be examined and croſs examined by the different parties, and therefore, in caſes depending on parol evidence, the teſtimony of perſons who are themſelves conuſant of the facts they relate, muſt in general be produced; for the relation of one who has no other knowledge of the ſubject than the information he has received from others, is not a relation upon oath; and moreover the party againſt whom ſuch evidence ſhould be permitted, would be precluded from his benefit of croſs examination. The few inſtances in which this general rule has been departed from, and in which *hearſay* evidence has been admitted, will be found, on examination, to be ſuch as were, in their very nature incapable of poſitive and direct proof. Of this kind are all thoſe which can only depend on *reputation*. The excluding of hearſay evidence in queſtions of *pedigree*, *preſcription*, or *cuſtom*, would prevent all teſtimony whatever; for the evidence of any living witneſs of what paſſed within the ſhort time of his own memory, would often be inſufficient in the former inſtance, always in the

Unleſs in particular caſes.

the latter; and there is no other way of knowing the evidence of deceaſed perſons, than by the relation of others, of what they have been heard to ſay. In theſe caſes, therefore, the law departs from its general rule, and receives evidence of the declarations of deceaſed perſons, who, from their ſituation, were like to know the facts; and alſo the general reputation of the place or family moſt intereſted to preſerve in memory the circumſtances attending it. Any thing which ſhews ſuch reputation is, on a queſtion of this ſort, received in evidence, though oftentimes wholly inadmiſſible in other caſes (*b*).

In

(*b*) If a queſtion arife as to the *legitimacy* of A. declarations of his father and mother deceaſed, as to whether they were married, and whether the plaintiff was born before or after marriage, are good evidence; but not to prove that the child born in wedlock is illegitimate for want of acceſs. *Stevens* v. *Moſs*, *Cowp.* 591. (*See this caſe more at large in c.* 8. *ſ.* 4.) So to prove the ſtate of a family, as who a man married, what children he had, that A. died abroad, &c. declarations of deceaſed perſons, who from their ſituation were likely to know, and the general belief of the family are ſufficient. *Vide Bul. N. P.* 294-5. In theſe caſes alſo the recital in deeds, the finding of a ſpecial verdict between other parties, ſtating a pedigree, inſcriptions on old grave ſtones, herald's books, entries in family bibles, (*Bul. N. P.* 233), the ſtatement of a pedigree in a bill in chancery (*Taylor* v. *Cole*, 7 *T. Rep.* 2, *note*) or the like, are good evidence.

In queſtions about a *right of way* alſo, reputation is received, and to prove a piece of land parcel of an eſtate, declarations made by a deceaſed tenant, at the

In ſome caſes, alſo, not within the exception as to hearſay evidence, the Law receives the memorandum in writing, made at the time by a perſon ſince deceaſed, in *the ordinary way of his buſineſs*, and which is corroborated by other circumſtances, as evidence of the fact it records (*c*).

What

time he was poſſeſſed, of whom he held, are good evidence (*Bul. N. P.* 295. *Davis* v. *Pearce*, 2 *T. Rep.* 53). So entries by a ſteward, ſince deceaſed, of money received by him of different perſons, in ſatisfaction of treſpaſſes committed on the waſte (*Barry* v. *Bebbington*, 4 *T. Rep.* 514), or by deceaſed officers for a townſhip, of the receipt of money from the officers of another townſhip, for a proportion of the church rates (*Head* v. *Heaton*, 4 *T. Rep.* 669), have been deemed admiſſible evidence to prove the right to the ſoil in the one caſe, and the liability of the townſhip paying, to repair in the other; for in theſe caſes, the entry was made at a time when no diſpute exiſted, by perſons who thereby charged themſelves with money, and were in fact acting againſt their own intereſt; and even declarations of deceaſed pariſhioners, at a time no diſpute exiſted as to the boundaries of a pariſh, are alſo evidence (*Rex* v. *Inhabitants of Hammerſmith*, *K. B. Sittings at Weſtminſter, after Hil. T.* 1776, *cor. Lord Mansfield, MS.*). But entries made in a book by the owner of land, of money paid him by a particular tenant, are no evidence after his death to prove his property in the land. *Outram* v. *Morewood*, 5 *T. Rep.* 121.

For ſome further obſervations on hearſay evidence, vide *Rex* v. *Eriſwell*, Appendix.

(*c*) Where it appeared that the plaintiff's draymen (he being a brewer) were uſed to come every night to the clerk of the brew-houſe, and give an account of the beer delivered out, which he ſet down in a book, and the draymen ſigned it, this, with proof of the draymen's hand-writing, was held evidence of delivery after

What a party (*d*) has himſelf been heard to ſay, does not fall within the objection as to hearſay

Admiſſions of parties.

ter his death (*Lord Torrington's Caſe, Salk.* 285, *Pilman* v. *Maddox, ib.* 690). But in another caſe where the plaintiff only proved the ſervant's hand-writing, Lord Chief Juſtice Raymondheldit inſufficient, ſaying, it differed from Lord Torrington's caſe, becauſe there the witneſs ſaw the draymen ſign the book every night (*Clerk* v. *Bedford, M.* 5, *G.* 2, *Bul. N. P.* 282). It is obſervable, that the ſtat. 7 *Jac. c.* 12, enacts that the ſhop-book of a tradeſman ſhall not be evidence after a year, whereas it is not at any time of itſelf evidence.

But in an action for a watch delivered to a watchmaker to be cleaned, the ſervant having ſworn that he ſaw his maſter deliver it to a third perſon by the owner's orders, and ſuch third perſon having ſworn that he never received it, Lord Kenyon permitted the maſter's day-book, containing an entry made by *himſelf* at the time, in the ordinary courſe of buſineſs, to be read in confirmation of the ſervant's teſtimony. *Digby* v. *Stedman*, 1 *Eſp. N. P. Caſ.* 329.

But an entry made by a banker's clerk, of his having paid a check was not permitted to be read as evidence of ſuch fact, though the clerk was reſident in a foreign country. *Cooper* v. *Marſden, Sittings after Eaſt. Term*, 1793, *MS.* 1 *Eſp. N. P. Caſ.* 1. *S. C.*

Where an eſtate had been enjoyed many years under a recovery ſuffered by a remainder man, and no ſurrender of the life eſtate could be found, the entry in the attorney's bill-book made at the time, containing charges for drawing and engroſſing the ſurrender (which bill had been paid), was, after the death of the attorney, received as evidence of the ſurrender. (*Warren dem Webb Grenville*, 2 *Stra.* 1129).

Upon an iſſue out of Chancery, to try whether eight parcels of Hudſon's Bay Stock, bought in the name of Mr. Lake, were in truſt for Sir Stephen Evans; his aſſignees (the plaintiffs) ſhewed firſt that there was no entry in the books of Mr. Lake, relating to this tranſaction. Secondly, ſix of the receipts were in the hands

hearſay evidence. Any thing, therefore, which he admits, or which another aſſerts in his preſence, and he does not contradict, is received as evidence againſt him; but what is ſaid by his wife (*e*), or any other member of his family,

hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas, (Sir Stephen's book-keeper,) to the book B. B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead, and upon this the Court of King's Bench, on a trial at bar, admitted the book referred to, in which was an entry of payment of the money, not only as to the ſix, but likewiſe as to the other two, in hands of Sir Biby Lake, the ſon of *Mr.* Lake. *Bul. N. P.* 282.

Another caſe ſimilar to the above, was *Smartle* v. *Williams*, where the queſtion being whether mortgage money was really paid, a ſcrivener's book of accounts was after his death received as evidence of the payment, vide *Bul. N. P.* 283. This caſe is reported in *Salk.* 245, 280. but the point is not there mentioned. It muſt be underſtood, that in this, as in the other caſes, ſome circumſtances were proved to lay a foundation for this book being received.

(*d*) What is ſaid by the party on record, though but truſtee for another, falls within the rule. *Bauerman* v. *Radcius*, 7. *T. Rep.* 633.

(*e*) The wife being conſidered in Law, as the ſervant of the huſband, her acts do not bind him, unleſs in caſes where there is evidence to ſhew that ſhe was employed or entruſted by him in the management of a buſineſs; even her acknowledgment of her having received wages, which ſhe had perſonally earned, was, in one caſe, held to be no evidence againſt her huſband, in an action brought by him for thoſe wages (*Hall* v. *Hill*, 2 *Stra.* 1094); and in another, when the huſband and wife, who, as executrix, joined in an action for a debt, due to the inteſtate, it was alſo held that no evidence could be received of declarations of the wife after

ſly, in his abſence, comes within the rule, and is therefore rejected.

But a diſtinction muſt be made between an admiſſion and an offer of compromiſe, after a diſpute has ariſen. An offer to pay a ſum of money in order to get rid of an action, is not received as evidence of a debt: the reaſon often aſſigned for it by Lord Mansfield, was, that it muſt be permitted to men "to buy their peace," without prejudice to them if ſuch offer did not ſucceed; and ſuch offers are made to ſtop litigation, without regard to the queſtion, whether any thing, or what is due. Therefore, if A. ſue B. for £100. and B. offer to pay him £20. it ſhall not be received in evidence; for this neither admits nor aſcertains any debt, and is no more than ſaying he would Bul. N. P. [236.]

Ibid.

ter her marriage. (*Alban and others* v. *Pritchet*. 6. *T. Rep.* 680.) If this evidence is not admiſſible where the wife is a party, or the meritorious cauſe of action, the rule applies with greater force where the cauſe of action ariſes from her delinquency, and, therefore, in an action for enticing away the plaintiff's wife, her declarations are inadmiſſible. *Winſmore* v. *Greenbank Willes*, 577.

But when the wife originally makes a contract, which is afterwards either expreſsly or tacitly ratified by the huſband, her declarations are evidence to charge him; and, therefore, in an action for nurſing the plaintiff's child, his wife's admiſſion that ſhe had agreed to pay 4s. a week, was allowed to be given in evidence, the Chief Juſtice (Pratt) obſerving, that matters of this kind, were properly under the directions of the wife. *Anonymous*, 1 *Stra.* 527. See alſo *Emerſon* v. *Blendon*, 1 *Eſp. N. P. Caſ.* 142.

give

give £20. to get rid of the action: but if an account consist of ten articles, and B. admits such a one is due, it will be good evidence for so much.

Wellake v. Collard, ib.

Admissions of *particular articles* before an arbitrator are also good evidence, for they are not made with a view to compromise, but the parties are contesting their different rights as much as they could do on a trial.

Slack v. Buchannan. Peake's Cas. 5.

On the same principle, the confession of a felon voluntarily made is evidence against him on his trial; but if any threats or promises have been made, to induce him to confess, no evidence of such confession is admitted; yet, if, in consequence of the confession so obtained, stolen property is found, evidence of that *fact* may be admitted, though the confession itself cannot be given in evidence.

Rex. v. Warwickshall. Leach Cro. Law. 299.

Presumptive evidence.

In cases where positive and direct evidence is not to be looked for, the proof of circumstances, and facts consistent with the claim of one party, and inconsistent with that of the other, is deemed sufficient to enable a Court of Justice, or more correctly speaking, a Jury under its direction, to *presume* the particular fact which is the subject of controversy; for the mind, comparing the circumstances of the particular case with the ordinary transactions of mankind, judges from those circumstances as to the *probability* of the story, and for want of

of better evidence, draws a concluſion from that before it. Long and undiſputed poſſeſſion of any right or property, affords a preſumption that it had a legal foundation, and rather than diſturb men's poſſeſſions, even records have been preſumed *(f)*. So if a landlord gives

(f) Thus where there had been a long and uninterrupted enjoyment of a Rectory, which originally belonged to the Crown, a Grant was preſumed (*Bedle* v. *Beard*, 12 *Co.* 5. *Powell* v. *Milbank*, cited *Cowp.* 103. and 1 *T. Rep.* 399.) In like manner a Recovery has been preſumed after a very long poſſeſſion, *Haſelden* v. *Bradney*, *Tr.* 11, 12 *Geo.* 2. *B. R.* cited 3 *T. Rep.* 159, and now by *Stat.* 14 *G.* 2. *c.* 20, it is expreſsly provided, "That all common Recoveries ſuffered or to be ſuffered without any ſurrender of the leaſes for life ſhall be valid. Provided it ſhall not extend to make any Recovery valid, unleſs the perſon entitled to the firſt eſtate for life, or other greater eſtate, have or ſhall convey, or join in conveying an eſtate for life at leaſt to the tenant to the *Præcipe*. And by the ſame Act, where any perſon has or ſhall purchaſe for a valuable conſideration any eſtate whereof a Recovery was neceſſary to complete the title, ſuch perſon, and all claiming under him, having been in poſſeſſion from the time of ſuch purchaſe, ſhall and may, after the end of twenty years from the time of ſuch purchaſe, produce in evidence the Deed making a tenant to the *Præcipe*, and declaring the uſes; and the Deed ſo produced (the execution thereof being duly proved) ſhall be deemed ſufficient evidence that ſuch Recovery was duly ſuffered, in caſe no record can be found of ſuch Recovery, or the ſame ſhould appear not regularly entered: Provided, that the perſon making ſuch Deed had a ſufficient eſtate and power to make a tenant to the *Præcipe*, and to ſuffer ſuch common Recovery. It is further enacted, That every common Recovery ſuffered, or to be ſuffered, ſhall, after the expiration of twenty years, be deemed valid, if it appear upon the face

gives a receipt for rent due at Michaelmas, and afterwards claims rent due at Lady day preceding, it furniſhes a ſtrong preſumption that ſuch preceding rent has been paid, and where a ſtale demand is made in a Court of Juſtice, the

face of ſuch Recovery that there was a tenant to the writ, and if the perſons joining in ſuch Recovery had a ſufficient eſtate or power to ſuffer the ſame, notwithſtanding the Deed to make a tenant to ſuch writ ſhall be loſt. It is further enacted, That every Recovery ſhall be deemed valid, notwithſtanding the fine or Deed making a tenant to ſuch writ ſhall be levied or executed after the time of the judgment given, and the award of ſeiſin; provided the ſame appear to be levied or executed before the end of the Term in which ſuch Recovery was ſuffered, and the perſons joining in ſuch Recovery had a ſufficient eſtate and power to ſuffer the ſame. This act only extends to caſes where the party ſuffering the Recovery, had a ſufficient eſtate to enable him to do ſo, and does not alter the rules of evidence in the caſe of a Recovery, ſuffered by a tenant in tail in remainder during the exiſtence of the eſtate for life, in ſuch caſe if the poſſeſſion has long gone according to the Recovery, a ſurrender of the life eſtate will be preſumed; but if diſputed recently after the death of the perſon who was entitled to hold without the aid of the Recovery, it will not. *Bridges* v. *Duke of Chandos*, 2 *Burr.* 1065.

Where a corporation had for 350 years been in receipt of Port Duties, which could only originate in a Grant from the Crown, ſuch Grant was preſumed. (*Mayor of Kingston upon Hull* v. *Horner*, *Cowp.* 102.) So the production of an original leaſe for a long term, and proof of poſſeſſion for ſeventy years, has been held ſufficient evidence of an aſſignment (*Earl dem Goodwin* v. *Baxter*, 2 *Blac.* 1228.) And poſſeſſion for 20 years, and an aſſignment of an old term of 2000 years, ſufficient to preſume the original Grant of the Term. *Denn dem Tarawell* v. *Barnard*, *Cowp.* 595.

very

very circumſtance of its coming late, in all caſes inclines the mind to ſuſpect that it has not a juſt foundation, and in many has been taken as complete evidence of the non-exiſtence or payment of it; but theſe caſes reſting on preſumption, and not on poſitive proof, very ſlight evidence is ſufficient to rebut and overturn them, and to call on the different parties to eſtabliſh their reſpective rights by the ordinary rules of evidence. (g)

If the judge at niſi prius admits a witneſs, New Trials.

(g) Where a bond has not been put in ſuit, or intereſt paid upon it, for 18 or 20 years, the Law calls upon the obligee to give ſome reaſon for the delay, and in default of his doing ſo, preſumes that it has been paid (*Forbes* v. *Wall*, 1 *Blac.* 532.) and the ſame rule applies to a ſcire facias, brought for execution on a judgment (*Curteis and another* v. *Fitzpatrick and another*, *K. B.* ſittings after *M. T.* 1796;) but in the caſe of a ſmall demand, which the party had no particular intereſt to collect, the rule does not apply, and therefore it has been held, that mere length of time, ſhort of the ſtatute of limitations, unaccompanied by other circumſtances, is not ſufficient to found a preſumption of a Releaſe of a quit-Rent. *Eldridge* v. *Knott*, *Cowp.* 214.

In the caſe of the bond, the payment of intereſt, or any other ſufficient reaſon why the action was not ſooner brought, would be an anſwer to the preſumption, which would otherwiſe ariſe from the length of time; and this fact of intereſt having been paid, would be ſufficiently proved by a receipt for it in the hand-writing of the creditor himſelf indorſed on the bond, before the time when the preſumption was likely to ariſe, becauſe then he had no intereſt in making ſuch indorſement (*Searle* v. *Lord Barrington*, 2 *Stra.* 826, 2 *Lord Raym.* 1370, *S. C.*) but it made after that time, it would be no evidence. *Turner* v. *Criſp.* 2 *Stra.* 827.

Bill of Exceptions. Demurrer to Evidence.

who is not competent, or evidence which is not admiſſible, or, on the contrary, rejects evidence, which he ought to have admitted, the general mode of proceeding, which has of late years been adopted, is to move the Court for a new trial; but this is not the only remedy the party has, he may, by *Stat. Weſtminſter* 2, tender a bill of Exceptions to the opinion of the judge, which he is obliged to ſeal, and then the queſtion goes immediately to a Court of Error: So if the party againſt whom the evidence is given, admits the legality and truth of it, but contends that it is not ſufficient to maintain the iſſue, he may then, alſo, (ſuppoſing the judge leaves the matter to the jury, as concluſive againſt him, but not otherwiſe) tender his Bill of Exceptions: but the moſt uſual method on this occaſion, ſuppoſing the evidence all on one ſide, is to demur to the evidence which takes the queſtion to the Court, out of which the record iſſues, without leaving it to the jury.

Gibſon v. Hunter, 2 H. Black. 187.

When a party demurs to evidence, he ought to admit the whole effect of the evidence, and not merely the facts which compoſe it; ſo that if it is only preſumptive, he muſt diſtinctly admit every concluſion which the jury might have drawn from it. If he does not do this, the other party is not obliged to join in demurrer; but if he does, a venire de novo muſt be awarded, for the Court cannot draw the concluſion.

ſion. It does not come within the plan of the preſent work to enlarge on this ſubject, nor is it neceſſary, as the profeſſion is already in poſſeſſion of ample inſtructions in the Law of Niſi Prius, where two chapters are devoted to it.

Having thus ſtated the general rules applicable to every ſpecies of evidence, as well written as parol, I ſhall now proceed to give them a diſtinct and ſeparate conſideration.

CHAP.

CHAP. II.

Of Written Evidence.

WRITTEN evidence has been divided by Lord Chief Baron Gilbert into two claſſes; the one that which is *public*, the other *private*; and this firſt has been again ſubdivided into matters of record, and others of an inferior nature. I ſhall follow theſe diviſions, and treat of each in its order.

SECTION 1.

Of Records.

Judgments and Acts of Parliament.

The memorials of the Legiſlature, ſuch as Acts of Parliament, (*a*) and other proceedings of

(*a*) Of Acts of Parliament the law makes a diſtinction between thoſe which are *public*, as concerning the realm, all ſpiritual perſons, all offices, and the like, and thoſe which ſettle the private rights of individuals, or particular places, and which are therefore called *private*. The former are not, correctly ſpeaking, the ſubject of proof in any Court of Juſtice, for, being the Law of the Land, they are ſuppoſed to be known to every man; and therefore the printed Statute Book is, on all occaſions, referred to, not as evidence to prove that of which every man

of the Two Houſes, when acting in a legiſlative character; and judgments of the King's ſuperior Courts of Juſtice are denominated *Records*, and are ſo reſpected by the Law, that no evidence whatever can be received in contradiction of them; (*b*) but being the precedents of the

Gilb. Law Ev. 7. Coke Lit. 260. a.

man is preſumed to be already conuſant; but for the purpoſe of refreſhing the memories of thoſe who are to decide upon them. But private Acts of Parliament not concerning the public, are not conſidered as *Laws*, but *facts*, and therefore muſt be proved like other records which concern private rights, by copies from the Parliament Rolls; for the printed Statutes are, in this reſpect, only private copies, and conſequently no evidence of the fact. In one caſe Lord *C. B. Parker* permitted the printed ſtatute touching the College of Phyſicians, which is a private act, to be read in evidence from the Statute Book printed by the King's printer, but the general, indeed univerſal practice, is to prove examined copies, vide *Gilb. Law Ev.* 10, 13. To prevent this inconvenience, the Legiſlature frequently declares, that acts, in their nature private, ſhall be deemed public, which enables Judges to conſider them as laws, and thereby prevents the neceſſity of evidence to prove, or ſpecial pleading to introduce them to the notice of a Court of Juſtice. For particular inſtances of what laws are conſidered as public, and what otherwiſe, vide *Bul. N. P.* 229, &c.

(*b*) By the practice of the Courts at Weſtminſter, all writs iſſued in vacation, are teſted as of a day in the preceding term; and when an iſſue is made up in a proceeding by bill, the plaintiff is ſtated to have brought his bill into Court on the firſt day of the Term, or of the term generally, which ſignifies the ſame thing. It was for ſome time doubted whether the parties were not eſtopped by this fiction, from ſhewing the exact day when the ſuit was commenced, but it was afterwards determined, that where it became neceſſary for the purpoſes of juſtice, to ſhew the day when the writ in fact iſſued,

the law to which every man has a right to have recourſe, they are not permitted to be removed from place to place to ſerve a private purpoſe, and are therefore proved by copies of them, which in the abſence of the original is the next beſt evidence.

Exemplifications and Sworn Copies.

Gilb. Law Ev. 14. 3 Inſt. 173.

Theſe copies are of three kinds; 1ſt, Such as are exemplified under the great or broad ſeal (which by virtue of that ſeal, become themſelves records (*c*) and can only be of proceedings

iſſued, either party might do ſo, and, therefore, wherever the defendant pleads a tender, or the ſtatute of limitations, or the plaintiff's cauſe of action accrues within the term, the day may be proved, by the production of the writ by the plaintiff, or a copy of the precipe after notice to produce it by the defendant, vide *Johnſon* v. *Smith*, 2 *Burr.* 950. *Morris* v. *Pugh*, 3 *Burr.* 1241.

But, in general, the filing of the bill is conſidered as the commencement of the ſuit, and therefore the plaintiff may give evidence of any cauſe of action ariſing before it, though after the writ ſued out. *Foſter* v. *Bonner*, *Cowp.* 454.

An officer, whoſe buſineſs it is to keep the records, may be examined as to the condition of them, but not as to the matter of the record. (*Leighton* v. *Leighton*, 1 *Strꝑ.* 219.) And if words have been ſtruck out, which render a record erroneous, witneſſes may be examined to ſhew ſuch words were improperly ſtruck out; but not to falſify the record, by ſhewing that an alteration whereby the record was made correct was improperly made. *Dickſon* v. *Fiſher*, 1 *Blac.* 664. 4 *Burr*, 2067. *S. C.*

(*c*) *Letters Patent* being under the Great Seal are alſo matters of record, and are, therefore, read without further proof, and by *ſtat.* 8 & 4 *Edw.* 6. *c.* 4. & 13 *Eliz.* *c.* 6. Patentees, and all claiming under them, may make

ings in the Court of Chancery, or those of the other Courts returned there by certiorari;) 2d, An exemplification under the seal of the Court, in which the proceedings are; or, lastly, a copy examined with the original by a witness, and proved by him on oath: An exemplification under the Great Seal is the only evidence where the record itself is put in issue, by a plea of *nul tiel record* in another Court (for if, in the same Court, the record itself is inspected;) but when the record, being merely inducement to the action, forms a part only of the evidence to the Jury, the examined copy is considered as sufficient evidence of it. But no copy of that so examined, however authenticated, is admitted; for if the party has the first copy, and by oath or otherwise, proves that a true copy, then the second is useless, and if only that is produced, then the first not being there to be sworn to, it does not appear that it is a true copy: In some cases, however, when it has been clearly shewn that a record once existed, which has been since destroyed, much inferior evidence of its contents has been admitted, (*d*) especially

Vide Tidd's Pract. 674, &c.

Gilb. Law Ev. 9.

Gilb. Law Ev. 22.

make title, by shewing the exemplification or constat of the Roll. These statutes have been held to extend to all the King's Patents which concern lands, privilege, or other thing granted to a subject, corporation, or any other. *Page's Case*, 5 *Co. Rep.* 53.

(*d*) In ejectment for a rectory, to which a recusant had presented, the Record of his conviction being destroyed

eſpecially in caſes where the Record is only inducement to an action.

Jones v. Randall. Cowp. 17.

Theſe copies are, in general, ſtamped, but it has been held that no ſtamp is neceſſary on a copy of the minutes of a judgment in the houſe of Lords.

Gilb. Law Ev. 24.

The exemplifications, or copies under ſeal, are conſidered as of higher authority than any ſworn copy, for the Courts of Juſtice which put their ſeals to them, are ſuppoſed to be more capable of examining them, and more critical and exact in their examination, than any other perſon is, or can be; and, therefore, no other proof is neceſſary of ſuch copies, than the production of them, for the Courts under whoſe ſeals they are authenticated making a part of the

ib. 19.

ſtroyed by fire, it was permitted to be proved by the Eſtreats in the Exchequer: but, in theſe caſes the moſt ſtrong and ſatisfactory evidence is required; the collateral evidence ſhould prove the ſame facts, as the regular evidence would if in exiſtence; and, therefore, where the Eſtreat and preſentment were of the ſame aſſizes, it was held no proof of a conviction, for the Stats, 23 *Eliz. c.* 1. *&* 29 *Eliz. c.* 6. direct proclamation to be made at the aſſizes where indicted, and for a perſon to render himſelf before the next aſſizes, and therefore he could not be convicted at the ſame aſſizes, vide *Knight* v. *Dauler. Hard.* 323. This ſpecies of evidence can be applicable to thoſe caſes only, where very ancient Records are loſt; for if a recent Roll is loſt, and its contents can be aſcertained, the Court will permit a freſh one to be engroſſed, vide *Douglas* v. *Jallop.* 2 *Burr.* 722.

Law

Law and Conſtitution of the country, their ſeals are ſuppoſed to be already known to every perſon like every other part of the Law; and, for the ſame reaſon, the ſeal of a Court conſtituted by Act of Parliament, as the great Seſſions in Wales, or a County Palatine is, of itſelf, ſufficient proof of the Record it authenticates.

Olivev. Gwin. 2 Sid. 145. Hard. 118. S. C.

Something ſimilar to exemplifications under the Seal of a Court are, what are denominated *office copies* of its proceedings, granted out and authenticated by an officer appointed by the Law for that purpoſe. There are, however, but few inſtances in which an officer is ſo entruſted, and though in caſes where he is, the Law, on account of the confidence repoſed in him, receives his copy without further evidence, yet, where that truſt does not form part of the duty of his office, his certificate is no more than that of any other private perſon, and gives the copy certified no credit whatever. (*e*)

Office Copies.

It

(*e*) In every inſtance, where any copy of a proceeding is granted out by an officer of the Court, as in copies of proceedings in Chancery, in the Crown office, &c. it is popularly called an *office copy*; but the ſenſe in which the word is here uſed, is much more limited. A copy ſo made is, for the ſake of convenience, permitted to be read in any part of the ſame cauſe, but it is not legally evidence before another Court. Thus the *office copies* of the Bill anſwer, and depoſitions are read in the Court of Chancery without further proof; but at common law they are no evidence, unleſs examined and proved, becauſe the officer is not entruſted by the Law to authenticate ſuch copy. The chirograph

Gilb. Law Ev. 22.

It is, in general, a rule, that before exemplifications, or other copies of records, are made, the record ſhould be drawn up in form, for

of a fine, or the indorſement on a deed by the proper officer, of its having been enrolled, are good evidence of the fine having paſſed, or the deed having been inrolled, without proving them examined; for the officer is appointed by Law to give out the copies in the one inſtance, and the certificate in the other. So an indorſement of a deed having been inrolled by the auditor of the Dutchy of Lancaſter, purſuant to a clauſe in the deed, is good evidence of the inrollment. *Kinnerſly* v. *Orpe*, *Dougl.* 56. But an indorſement on the fine, by the ſame officer who made out the chirograph that proclamation had been made, is no evidence of ſuch proclamations: becauſe, though the chirographer is authoriſed to make copies of the agreement filed of Record for the parties, yet the ſtatute which gives that authority, does not appoint him to copy the proclamations. To prove this, therefore, the copy muſt be examined with the Record, and proved as in other caſes. So a copy of a judgment, made by the Clerk of the Treaſury, muſt, nevertheleſs, be examined with the original record; and if a deed be loſt, and a copy made out from the inrollment, and offered to a jury as the next beſt evidence the caſe will admit of, it ſhould be examined with the inrollment, and proved by a witneſs; for though the ſtatute 27 *H.* 8. *c.* 16. authoriſes the clerk to certify the Inrollment, he is not intruſted to give out copies, vide *Gilb. L. Ev.* 24 to 26. *Bul. N. P.* 229. The Clerk of the Rules is appointed to make out the Rules of the Court, and authenticate them, and therefore a rule produced under his hand, is ſufficient without proving it examined with the entry in the books, *Selby* v. *Harris*, 1ſt *Lord Ra.* 754. But where the examination of a ſoldier had been taken by two magiſtrates touching his ſettlement, it was held that the ſignatures of the magiſtrates ſhould be proved, notwithſtanding the mutiny act makes ſuch examination evidence of his ſettlement, *Rex.* v. *Bolton, with Harrowgate, Eaſt* 13.

though

though, by the practice of the Courts at Weſtminſter, the party may take out an execution immediately, the judgment paper is ſigned by the officer of the Court; yet it is not a perfect and permanent record, till brought into Court, and there filed as a memorandum, or roll: Till that is done, it is transferable to any place, and ſo does not come within the reaſon of the law, which permits a copy to be given in evidence. But when, by the practice of the Court, the minutes are conſidered as the judgment itſelf, and it is not uſual to make any further entry, copies of ſuch minutes may be given in evidence, as is always done in the caſe of minutes of the Houſe of Lords of the judgment given by them, on an appeal from the Court of Chancery.

Jones v. Randall, Cowp. 17
Rex v. Ld. G. Gordon, Doug. 590.

The record being ſo completed, the whole and not a part only, muſt be exemplified or copied, in order that the Court may be in poſſeſſion of the full effect of it, for a partial extract may bear a very different import from the whole taken together: but in caſes of public concern, ſuch as the Miniſter's return to the Commiſſion in Henry the Eighth's time to enquire into the value of livings, ſo much as relates to the particular matter in diſpute is ſufficient.

8 Inſt. 178. Gilb. Law Ev. 17, 18.

Per Hard. Chan. in Sir Hugh Smithſon's caſe, vide Bul. N. P. 228.

Having thus ſhewn how a record is to be proved, the next object of enquiry will be, againſt

Againſt whom a record is evidence.

gainſt whom it is evidence, and to what extent.

Lewis v. Clarges. Gilb. Law Ev. 29. Bul. N. P. 232.

A judgment of a debt is concluſive evidence of it, againſt the parties; and if any queſtion ariſe reſpecting lands, and the verdict of a jury is given on it, ſuch verdict is received as evidence of the fact it finds, in any future diſpute between the ſame parties, or others claiming under them, though the diſpute is in reſpect of other lands; but as againſt third perſons, a verdict in a civil caſe, is no evidence whatever; for the firſt principles of natural juſtice require that a man ſhould be heard before his cauſe is decided, and if he were to be bound, or in the leaſt degree prejudiced by a verdict where he had no opportunity of croſs examining the witneſſes, it would, in effect, be overturning this moſt ſalutary rule of juriſprudence. Even where an ejectment was brought againſt ſeveral, and there was a verdict againſt one, this was held to be no evidence againſt the others, becauſe they could not have an attaint.

Per Cur. 8 Mod. 142.

Gilb. Law Ev. 84.

In general, too, the benefit of the rule is mutual; and, therefore, if in a ſuit between A. and B. a verdict paſſes for A. C. who was no party to the cauſe, is not permitted to give this in evidence againſt B. in any future action there may be between them; on the principle that it would be unjuſt to ſuffer that to be given in evidence againſt a man, from which he could not have derived any benefit; but this

general

general rule is liable to exception, in cases where a man is privy in estate with the person who recovers the verdict, for in such case the verdict will be evidence for him, though he would not have been bound by it, had it been the other way. *(f)*

But

(f) If there are several remainders in the same deed, and one of the remainder men recovers a verdict in an action brought against him for the land, another remainder man may give this verdict in evidence in another action against him, at the suit of the same plaintiff, for, had the verdict been against the Termor, the remainder man would have been dispossessed. Vide *Pike* v. *Crouch*, 1 *Lord Raym.* 730, and *Rushworth* v. *Countess of Pembroke*, *Hard.* 472. So had there been a verdict for the tenant for life, even in ejectment, where no aid can be prayed, it seems that the reversioner might nevertheless, give this verdict in evidence, because he would have been prejudiced by such verdict, for his reversion would have been turned thereby into a naked right. Of this, however, Lord Chief Baron Gilbert (page 35) makes a quere, and the point seems never to have been decided.

If A. prefers a bill against B. and B. exhibits his bill in relation to the same matters, against A. and C. and a Trial at Law is directed, C. cannot give in evidence the depositions in the cause between A. and B. but it must be tried entirely ut res nova. *Rushworth* v. *Countess of Pembroke*, *Hard.* 472.

In *Com. Dig. Evid. A.* 5, it is said, A verdict for or against the plaintiff, with proof of the evidence by him given, shall be evidence in an action *by another* against him, for the same thing. As in an action by a common Carrier for goods delivered by mistake, a verdict for or against the plaintiff, with the proof by him given, shall be evidence in an action by the owner against the carrier, for the same goods. Per *Holt*, at *Guildhall*, 14 *W.* 3. Mr. J. Buller (N. P. p. 243) mentions the same case, but it seems there that the verdict was not given in

But when it is ſaid that a verdict is not evidence for or againſt one who is not party to a cauſe, it is not to be underſtood that a man, who merely uſes the name of another for his own benefit, is not bound by the verdict which is given againſt him. Courts of Juſtice, in theſe caſes, will take notice who is the real plaintiff or defendant in a cauſe; and, therefore, if a man brings an ejectment in the name of another, as his leſſee, he being in fact the real plaintiff in the cauſe, the verdict is evidence for or againſt him, in an ejectment brought in the name of another plaintiff, on his demiſe; and, in like manner a recovery in an action of treſpaſs, againſt one who, juſtified as ſervant of A. is admiſſible, though not concluſive evidence in an action againſt another ſervant of A. for a ſimilar treſpaſs.

Gilb. Law Ev. 85.

Kinnerſly v. Orpe, Dougl. 517.

Verdicts in criminal caſes are ſometimes received as evidence to eſtabliſh facts which were neceſſarily tried on the indictment, as if a man be convicted of bigamy, and the ſecond wife, after his death, ſue for dower, on a plea of ne unques accouple, the conviction will be admiſſible evidence before the Biſhop, to ſhew ſhe was not his lawful wife. In this caſe, however,

Gilb. Law Ev. 34. Bul. N. P. 245.

in evidence, *as the verdict of a jury determining any point*, but as evidence of a confeſſion on record by the Carrier, that he had the goods of the perſon who afterwards ſo brought the action; and to lay a ground for proving what a deceaſed witneſs ſwore.

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it is not *concluſive* evidence, though it would in an ejectment, where the ſame queſtion aroſe; but had the party been acquitted, this would have been no evidence at all in ſupport of the ſecond marriage, for it proves no fact; the defendant might have been acquitted, becauſe he had reaſon to believe his firſt wife was dead, or, for many other reaſons, without ſuppoſing the ſecond a legal marriage. In like manner when there has been a judgment for the Crown on an information *in rem* in the Exchequer, it has been held to be *concluſive* evidence to veſt the property in the Crown, and not to be controverted in any civil action; but a judgment of acquittal does not ſeem to have ſo ſtrong an operation in favour of the party. (*g*)

Gilb. Law Ev. 32.

It

(*g*) *Scott* v. *Shearman*, 2 *Blac.* 977. In an action of treſpaſs for breaking the plaintiff's houſe and ſeizing his goods, which conſiſted of a quantity of geneva, the defendants, who were Cuſtom-houſe officers, proved a copy of record of condemnation, in the Exchequer, of the ſame geneva, and the Court, after ſolemn argument, held this concluſive evidence in favour of the defendants, and not to be controverted.

Cooke v. *Sholl*, 5 *T. Rep.* 255. Trover for ſeveral pipes of wine: The plaintiff being a wine-merchant, had purchaſed theſe pipes of one Hicks, which the defendants ſeized for want of a permit; and it appearing to be a malicious ſeizure, the jury gave a verdict for the plaintiff with 150l. damages. The defendant had proſecuted this ſeizure in the Court of Exchequer, and the record of *acquittal* was read in evidence. The defendant inſiſted under the circumſtances (which it is unneceſſary here to ſtate) that the permit was out of time,

It was before obſerved, that the general rule was, that no judgment or verdict could be given

time, and the judge was of that opinion, but it being ſuggeſted that a different determination had been made in the Court of Exchequer, he ſaved the point, with liberty to enter a verdict for the defendant if it ſhould be adjudged with him.

The counſel was proceeding to argue the cauſe on the merits, when the Court ſuggeſted a doubt upon another ground, and *Lord Kenyon* ſaid that he conceived the judgment of acquittal *in rem* was concluſive as to the queſtion of the illegality of the ſeizure, and precluded all reaſoning upon the conſtruction of the permit; and however he might doubt whether the Court had put a true conſtruction upon the effect of the inſtrument, yet he could not help thinking that the judgment of acquittal was concluſive as to the illegality of the ſeizure which was the ſubject of the preſent action. That it ſeemed to be taken for granted, in Lord Manſfield's time, that a judgment of condemnation *in rem* was concluſive between the parties.

On this the rule was diſcharged: but on a ſubſequent day *Leyceſter* moved to open the rule again, ſtating that the ground on which they had before decided, was not clearly ſettled, and therefore he wiſhed to have an opportunity of arguing it, for that there was a diſtinction as to the effect of a judgment of *acquittal* or *condemnation*, in rem the Exchequer; the former was not concluſive, though the latter was. *Bul. N. P.* 245. But independently of that queſtion, he obſerved, that the caſe had been ſaved on a different point, which was ſtated in the report, namely the conſtruction of the permit. Upon this the matter was ordered to ſtand over, and when it came on again, *Bower* for the plaintiff confined his obſervations to the effect of the judgment of acquittal in the Exchequer, and preſſed the other ſide to conſent to have the whole matter ſtated on the record: but this being objected to, *the Court*, though they expreſſed a wiſh that the parties would conſent to have the queſtion reſpecting a judgment of acquittal on the record as it was a point of great importance; ſaid that

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en in evidence againſt a perſon not party or privy to the record; there is, however, one general exception to this rule, and that is, wherever the matter in diſpute is a queſtion of public right; in this caſe, all perſons ſtanding in the ſame ſituation as the parties, are affected by it, and it is evidence to ſupport or defeat the right claimed; thus a verdict finding a preſcriptive mode of tything, the right of a city or toll, the right of an election of a church-warden, a cuſtomary right of common, the liability of a pariſh to repair a particular road, a public right of way, or the like, is evidence for or againſt the cuſtom or right, though neither of the litigating parties are named in, or claim under thoſe who are parties to the record.

Gilb. Law Ev. 86. City of London v. Clarke, Carth. 181. Berry v. Banner, Peake's N. P. 156. Rex v. St. Pancras, ibid. 219. Reed v. Jackſon, Eaſt 355.

at preſent they could not go out of the report which confined the queſtion to the only point made at the trial concerning the conſtruction of the permit, on which no doubt could be entertained, but that the time was out when the ſeizure was made, and ſo there muſt be a verdict for the defendant. Rule abſolute.

In the following caſe, however, a ſentence of acquittal was conſidered as concluſive. In an action of aſſault and battery, the defendant juſtified as an officer in the army for diſobeying orders, and gave in evidence a ſentence of a council of war upon a petition againſt him by the plaintiff, and the petition being diſmiſſed by the ſentence, it was holden to be concluſive evidence for the defendant. *Lane* v. *Degberg*, *H.* 11. *W.* 3*d Bul. N. P.* 244.

For the ſeveral inſtances in which a judgment of a Court, whether of record or otherwiſe, ſhall be admitted as evidence, and to what extent: See note (*r*), chap. ii.

Pitton v. Walter, 1 Stra. 161.

I ſhall conclude this part of the ſubject, by mentioning one more rule applicable to *verdicts*; and that is, that until final judgment is entered upon them, they are no evidence of the fact having been legally decided, for if the poſtea only is produced, it does not appear that the judgment might not have been arreſted, or a new trial granted, but the poſtea is good evidence to ſhew that a trial was had between the ſame parties, ſo as to introduce an account of what a witneſs, who is ſince dead, ſwore at that trial, for which purpoſe even a nonſuit is evidence. A verdict on an iſſue out of Chancery, however, is full proof of the fact it finds, though no judgment is entered upon it, for the decree is equal proof that the verdict was ſatisfactory, and ſtands in force.

Montgomerie v. Clark. B. N. P. 242.

Writs. Gilb. Law Ev. 40, Bul. N. P. 234.

Writs iſſuing out of the Courts at Weſtminſter, are not conſidered as records, till returned and filed in the Court; whenever, therefore, a writ is the gift of the action, it muſt be filed, and a copy of it taken from the record; inaſmuch as the party is to have the utmoſt evidence the thing is capable of, for it cannot become the gift of an action till it is returned; but when the writ is only inducement to the action, the fact of its having iſſued, may be proved by the production of the writ itſelf, becauſe, by poſſibility it might not be returned, in which caſe we have ſeen it is no record.

SECT.

SECTION II.

Of Public Writings not being Records.

PUBLIC matters, not of record, are next to be conſidered.—Some of theſe reſembling records in being confined to one place for public ſatisfaction, the Law ſuffers the like evidence to be given of them, as is uſually given to a Jury of Records, viz. true copies examined with the original; and gives a degree of credit to others when produced, which it does not to a mere private inſtrument.

Of this nature are—

1ſt, PROCEEDINGS IN THE COURT OF CHANCERY, by bill of complaint, which not being precedents of juſtice, but founded on the circumſtances of each private caſe, are not conſidered as furniſhing a general rule of action, and for that reaſon are not denominated records.

2dly, Proceedings in the ECCLESIASTICAL or ADMIRALTY COURTS.

3dly, Thoſe in FOREIGN COURTS.

4thly, INFERIOR JURISDICTIONS.

5thly, Acts of State and General Hiſtory.

6thly, COMMISSIONS executed on public occaſions.

7thly, PARISH REGISTERS.

8thly, All

8thly, All other things which, *applying to ſeveral perſons*, are in ſome degree of a PUBLIC NATURE, as the rolls of Courts Baron, Terriers, and books of public companies and corporations.

Bill in Chancery. Snow v. Philips, 1 Sid. 220. Bul. N. P. 235.

The bill in Chancery, when further proceedings had been taken on it, was formerly conſidered as evidence againſt the plaintiff, of any fact ſtated in it; but in modern times, Courts, properly conſidering that moſt of the facts are the mere ſuggeſtion of counſel to extort an anſwer from the defendant, have held that it is no evidence for any other purpoſe, than merely to ſhew that ſuch a bill was in fact filed, or to prove ſuch facts as are the ſubject of reputation and hearſay evidence, as the plaintiff's pedigree and the like.

Doe dem Bowerman v. Sybourn, 7 T. Rep. 2.

Taylor v. Cole cited 7 T. R. 8, note (a).

Anſwer. Godb. 326.

That the anſwer of a defendant is evidence againſt the perſon ſwearing it, there can be no doubt, for if the admiſſion of a man is received as proof of a fact againſt him, much more ought that confeſſion which he makes on oath; but ſtill it is conſidered as a confeſſion only, though under a higher ſanction, and therefore is admitted in no caſe where a confeſſion would not be evidence; for which reaſon the anſwer of an infant by his guardian who is ſworn to it, is not received as evidence againſt his rights; and doubts have been entertained how far a *feme covert* ſhould be prejudiced by her anſwer.

Eccleſton v. Petty, alias Speke Carth. 79.

Wrottesley v. Bendiſh, 3 P. Will. 235.

(*b*) The

(*h*) The conſequence which follows from the anſwer being conſidered as an admiſſion only, is that the objection that it was *res inter alios acta*, does not apply as in the caſe of other legal proceedings ; therefore in an action againſt B. the anſwer of A. his partner, to a bill filed againſt him by *other creditors*, was admitted as evidence of the facts ſtated in it ; as was alſo the voluntary affidavit of one man, who was jointly intereſted with another in an action brought againſt them both.

Grant v. Jackſon, and another, Peake N. P. 203, Vicary's caſe, Exchcq. Gilb. Law Ev. 57.

We have before ſeen that a copy of the whole judgment, and not a partial extract of it muſt be produced to the jury : the reaſon on which the rule was eſtabliſhed, applies with equal force to proceedings in a Court of Equity, and indeed every other written inſtrument. The defendant is entitled, in a Court of Law, to have the whole of his anſwer read, and ſo far was this rule carried in one caſe, that where one anſwer had been put in by the defendant,

Brockman's caſe, Gilb. Law Ev. 51. 1704, per Gould.

Earl of Bath v. Batterſea, 5 Mod. 10. Rex v. Carr 1 Sid. 418.

(*h*) *Wrotteſley* v. *Bendiſh*, 3 *P. Will.* 235. In this caſe, where the queſtion was, whether the wife ſhould anſwer jointly with her huſband or not, the Lord Chancellor ſaid, "I do not now give any opinion whether the anſwer may be read againſt the wife, when diſcovert, or not, but as in all times heretofore the wife, as well as the huſband, has been compelled to anſwer, I would not take upon myſelf to overthrow what has been the conſtant practice ;" but his Lordſhip ſaid he would not compel her to anſwer any thing which might ſubject her to a forfeiture, though the huſband ſubmitted to anſwer.

and

and on exceptions taken to it, he put in a ſecond anſwer, he was allowed on an information for perjury to read the ſecond anſwer, in explanation of the general terms of the firſt. When, therefore, an anſwer is given in evidence, (*i*) the party producing it makes the whole

(*i*) In Courts of Equity the practice is different, the plaintiff may there ſelect a particular admiſſion, and when that is read, the defendant is obliged to prove the other facts ſtated in his anſwer by other evidence: Thus where to a Bill by Creditors againſt an executor for an account, the executor anſwered that 1100l. was depoſited by the teſtator in his hands, and that afterwards on making up his amounts with the teſtator, he gave a bond for 1000l. and the other 100. was given him for his trouble and pains in the teſtator's buſineſs; though there was no other evidence that the 1100l. was depoſited but the executor's own oath, it was held, that when an anſwer was put in iſſue, what was confeſſed and admitted in it need not be proved by the plaintiff, but that it behoved the defendant to make out by proofs what was inſiſted on by way of avoidance. But this was held under this diſtinction: when the defendant admitted a fact, and inſiſted on a *diſtinct fact* by way of avoidance, *then he ought to prove the matter in his defence*; becauſe it may be probable that he admitted it out of apprehenſion that it might be proved, and therefore ſuch admittance ought not to profit him, ſo far as to paſs for truth, whatſoever he ſays in avoidance: but if it had been *one fact*, as if the defendant had ſaid the teſtator had given him 100l. it ought to be allowed, unleſs diſproved; becauſe nothing of the fact charged is admitted, and the plaintiff may diſprove the whole fact as ſworn, if he can do it. And it being urged, that here the probability was on the defendant's ſide, becauſe the teſtator did not take a bond for this ſum as for the reſidue, the Chancellor ſaid there was ſome preſumption in that, but not enough to carry ſo large a ſum without better atteſtation. *Anony. Hill. Vac.*

whole of it evidence for the defendant, of the facts ſtated in it; ſtill, though evidence of thoſe facts, it is not concluſively ſo, but the plaintiff may contradict it by other evidence; or if the jury from the whole circumſtances of the caſe ſee reaſon to believe one part of it, and to diſbelieve another, they may uſe the ſame diſcretion in this inſtance, as in every other of drawing ſuch concluſion, as reſults from all the circumſtances taken together.

There is one inſtance, however, in which a part of an anſwer may be read without making the whole evidence, and that is where a perſon offered as a witneſs, has, in an anſwer, ſhewn himſelf intereſted in the event of the cauſe; the part of the anſwer which is read for the purpoſe of rejecting his teſtimony, does not entitle him to have any other part read, and this for the beſt of all poſſible reaſons, viz. that by

Sparin v. Drax, Mich. 27, ch. 2. Bul. N. P. 238.

Vac. 1707. *per* Cowper *Chan. Gilb. Law Ev.* 52. I have been particular in extracting the whole of this caſe, becauſe perhaps no other better ſhews the diſtinction between the rules of evidence in the common Law Courts, and thoſe poſſeſſing an equitable juriſdiction. In a Court of Law, it would have been ſaid, as was urged in this caſe, that "If a man was ſo honeſt as to charge himſelf when he might roundly have denied it, *and no teſtimony could have appeared*, he ought to obtain credit when he ſwears in his own diſcharge." My habits of thinking and legal notions, having been formed in Courts of Law, may perhaps have given me an unfair prejudice in favour of their rules; but I do confeſs that, to me they appear, in this particular at leaſt, moſt conſonant to reaſon and juſtice.

doing

doing ſo, the very purpoſe for which it was produced, would be defeated, and he would be giving his teſtimony in the anſwer at the time that it appeared, that all evidence from him was inadmiſſible.

Brockman's caſe, Gilb. Law Ev. 52.

Similar to an anſwer is an affidavit of a man in the courſe of a cauſe; but a voluntary affidavit, or one not made in the courſe of a judicial proceeding, as for inſtance, one made by the vendor of an eſtate before a Maſter in Chancery, to ſatisfy the purchaſer that the eſtate was free from incumbrances, cannot be proved without producing the original, and if meant to be relied on as a repreſentation upon oath, muſt be proved alſo to be ſworn; for if only the hand-writing is proved, it has no further effect than an admiſſion in a note or letter, whereas the anſwer in Chancery always being on oath, it is in all civil caſes taken to have been ſworn without further proof than copies of the proceedings in the cauſe; and even on an indictment for perjury, proof of the handwriting of the maſter before whom it purports to be ſworn, and of the defendant himſelf, has been held ſufficient evidence of the adminiſtration of the oath.

Smith v. Gordon, 3 Mod. 36.

Gilb. Law Ev. 67.

Rex v. Morris 2 Burr, 1189.

Depoſitions.

The next kind of proceedings which generally come from the Court of Chancery are the depoſitions of witneſſes. Theſe are not received

ed on the ſame principle as the anſwer, namely, as an admiſſion of the party, but as the next beſt evidence in the room of ſome other, which his adverſary has been deprived of; and therefore it is, that in no caſe where a witneſs is living and to be found (*k*), ſhall his depoſition be read as evidence of the facts depoſed to, or for any other purpoſe than to confront and contradict him. But when it is proved that the witneſs is dead, or that he cannot be found after the moſt diligent ſearch, or, as has been ſaid, has fallen ſick by the way (*l*), the depoſition of ſuch witneſs ſhall be admitted in evidence; for, though a private examination does not give that ſatisfaction to the mind, which a public one before a judge and jury does, it is nevertheleſs the repreſentation of the witneſs under the ſanction of an oath, and when it is impoſſi-

Tilly's caſe, Salk. 286.

Benſon v. Olive, 2 Stra 920. Godb. 326. Vide Luttrel v. Cory, 1 Mod. 283.

(*k*) In *Tilly's* caſe, the witneſs after examination became intereſted, and was a party in the cauſe, and Trevor C. J. at firſt thought that his depoſition might be read; but Tracy and Blencoe being of a contrary opinion, Tracy went to the King's Bench to aſk the opinion of that Court, and C. J. Holt thinking that it was not evidence, Trevor agreed. Vide etiam *Baker* v. *Lord Fairfax*, 1 *Stra.* 101. In *Kinſman* v. *Crooke*, 2 *Lord Raym.* 1166, the witneſs had been examined in Chancery, and there referred to a written account. He afterwards became blind, and on a trial at Law his depoſition was read, and he called to give parol evidence in ſupport of it.

(*l*) Though a good ground for poſtponing the trial, this would hardly now be conſidered as ſufficient to make the depoſition evidence.

ble for the party to produce the witneſs, it would be hard to deprive him of this next beſt evidence. Even depoſitions before Commiſſioners of Bankruptcy, when recorded according to the directions of 5 Geo. 2, c. 30, have after the death of a witneſs been admitted to be read; as has alſo the evidence which a witneſs gave on a former trial, after a foundation has been laid for it, by the production of the poſtea.

Janſon v. Wilſon, Dougl. 244.

Coker v. Farewell, 2 P. Will. 563.

Depoſitions in other Courts.

It ſometimes happens that when witneſſes are reſident abroad, or about to leave the kingdom, depoſitions are taken by the conſent of the parties in a cauſe; in this caſe, the party who means to read ſuch depoſitions, ſhould be prepared at the trial to ſhew that the witneſs is not within the reach of the proceſs of the Court.

While on the ſubject of depoſitions, it may not be improper to mention thoſe taken by Magiſtrates under the ſtatutes 1 and 2 Ph. and M. c. 13, and 2 and 3 Ph. and M. c. 10. By the firſt of thoſe ſtatutes it is enacted, "That juſtices of the peace, or one of them, when a priſoner is brought before them for manſlaughter or felony, before any bailment or mainpriſe, ſhall take the examination of the priſoner, and information of them that bring him, of the fact and circumſtances thereof; and the ſame, or as much thereof as ſhall be material to prove the felony, ſhall put in writing, &c." The proviſions of this ſtatute, relative to caſes where the

the party is admitted to bail, are by the other ſtatute extended to thoſe where he ſhall be committed to priſon. On theſe ſtatutes it has been holden; that if in a caſe of felony one magiſtrate takes the depoſition on oath of any perſon in the preſence of the priſoner, whether the party wounded, or even an accomplice; and the deponent dies before the trial, the depoſitions may be read in evidence; but if the priſoner be not preſent at the time of the examination, it cannot be read as a depoſition taken on oath, though in caſes where a party wounded was apprehenſive of, or in imminent danger of death, it may be received as his dying declaration. This act of parliament only extends to caſes of felony, and therefore ſuch examination cannot be read on an information for a libel.

Rex. v. Radbourne Leach Cr. Caſ. 512.

Rex. v. Weſtbeer, ibid. 14.

Rex. v. Dingler, ibid 638.

Rex. v. Paine Salk. 281.

In like manner depoſitions taken before a coroner, may, in caſe of the death, or abſence beyond ſea, of the witneſſes, be uſed on a trial for murder. (*m*)

Bromwich's caſe 1 Sid. 180. Thatcher and Waller's caſe, Sir T. Jones 53.

It

(*m*) In the *King* againſt *Ravenſtone*, 5 *T. Rep.* 373, the court of King's Bench held, that where a pregnant woman died after examination, but before an order of filiation, ſuch examination taken under the Stat. 6 *G.* 2 *c.* 31. was admiſſible evidence on an application to the Quarter Seſſions to make an order of filiation on the putative father; and that, if not contradicted, it ought to be conſidered as concluſive. But in the caſe of *Rex* v. *Eriſwell*, 3 *T. Rep.* 707, where two juſtices had taken the examination of a pauper relative to his ſettlement, but did not remove him thereon, and he afterwards became inſane, the Judges of the Court of King's Bench were equally divided on the queſtion, whether

It was before obſerved that a verdict could not in general be given in evidence againſt a man who was not a party to the cauſe, and therefore had no power to croſs-examine the witneſſes. This rule applies equally to the caſe of depoſitions, which are, as to a ſtranger to the cauſe, mere ex parte examinations; and the converſe of the propoſition, namely, that a man who is not bound by the depoſitions, ſhall not avail himſelf of them, applies with ſtill greater force; for if this were allowed, he might uſe all thoſe which made for him; and thoſe of a contrary deſcription could not be uſed againſt him, becauſe he had no power to croſs-examine the witneſſes.

Ruthworth v. Counteſs of Pembroke, Hard. 472.

Another general rule, applicable to all proceedings in Courts of Equity, is that, in order to give in evidence an anſwer, depoſitions, affidavits, or any other interlocutory proceeding in a cauſe, a foundation muſt firſt be laid by

Roch v. Rix. Gilb. Law Ev. 55.

whether two other juſtices could remove his family on that examination. The opinions of the Judges in this caſe, not only on the point before the Court, but alſo as to hearſay evidence in general, are too valuable to be omitted or abridged, and therefore are printed at length in Appendix, No. I.

Another caſe ſomething ſimilar in its circumſtances, has ſince come before the Court; the pauper having been examined and removed by two juſtices, after notice of appeal, and before the trial of it, abſconded, and could not be found; nevertheleſs the Court held that the reſpondents could not read his examination on the hearing of the appeal. *Rex* v. *Nuncham Courtney*, *Eaſt* 733.

proof

proof of all the former ſtages of it; as the bill to make way for the anſwer, the bill and anſwer, or that the defendant was in contempt, as the foundation for the depoſitions, and ſo on; otherwiſe, two inconveniences would follow; firſt, that the whole context and bearing of the evidence would not appear; ſecondly, that the Court could not ſee whether it was a regular proceeding; and if not, then the anſwer or depoſitions would have only the effect of a mere voluntary affidavit, which, if made by a ſtranger, could not be received as any evidence at all, becauſe there the party would have no opportunity of croſs examination; and if by the party, then only under the circumſtances and manner before ſtated.

Piercy v. Sir T. Jones 164. Gilb. Law Ev. 65.

Stile 446.

In order further to explain what is before ſaid, as to the neceſſity of the proceedings being regular, to make the depoſitions evidence, it may be neceſſary here to mention that the diſtinction which has been taken in the books, as to the regularity of proceedings is this,—if the bill be diſmiſſed becauſe the plaintiff is irregular in his proceeding, as where a deviſee on a ſuit commenced by his deviſor, brings a bill of revivor, and ſeveral depoſitions are taken, and then the cauſe on hearing is diſmiſſed, becauſe a deviſee claiming as a purchaſer, and not by repreſentation, cannot bring a bill of revivor; in this caſe, the depoſitions can never be read in any other cauſe, becauſe there was no cauſe regularly

Backhouſe v. Middleton, 1 Ch. Caſ. 173.

Smith v. Veale, 1 Lord Ray. 735.

regularly before the Court; but if a cauſe was once properly before the Court, though the bill was diſmiſſed becauſe it was not a matter fit for Equity to decree, the depoſitions will be evidence.

Roch v. Rix, Gilb. Law Ev. 56. vide 5 Mod. 211.

We have before ſeen that even a judgment when deſtroyed, may be proved by ſecondary evidence; this rule applies univerſally to all ſpecies of evidence, and, therefore, where it appeared from the evidence of the proper officer, that the office had been ſearched, and the bill could not be found, the anſwer was permitted to be read without it, ſo ancient depoſitions have been received as evidence without bill or anſwer; but to entitle a party to deviate ſo much from a general rule, they ought certainly either to be fortified by great length of time, or elſe ſome other reaſonable evidence be given, that the bill had been once there, and in what way it had been loſt.

Blower v. Ketchmore. 2 Keb. 31.

Decree.

The decree is evidence on the ſame principle as a judgment in a Court of Law, and ſubject to the like rules, viz. that where it reſpects private property or individuals, it is only evidence againſt parties to the ſuit, or others claiming through them; but when the queſtion is of a public nature, it is then evidence againſt all perſons ſtanding in a ſimilar ſituation with the parties to it.

Caſe of Mancheſter Mills, Dougl. 222 note 13. Ld. Thanet v. Patterſon. Bul. N. P. 235.

While the decree remains in paper, it cannot be read in evidence without alſo proving copies

of

of the bill and anſwer, unleſs they are recited at length in it: but when it is under the ſeal of the Court, and inrolled, it is of itſelf evidence; and the oppoſite party may ſhew that the point in iſſue in that ſuit was different from that before the Court. (*n*)

Of the ſame authority as Anſwers, Depoſitions, (*o*) and Decrees of the Courts of Equity, are the depoſitions, anſwers to libels, and ſentences in the *Eccleſiaſtical and Admiralty Courts*, on a queſtion ariſing within their reſpective juriſdictions.

Eccleſiaſtical and Admiralty Courts.

Vide Gilb. Law Ev. 67 2 Mod. 281. Mildmay v. Mildmay 1 Vern. 53. Kempton v. Croſs, Caſ. Temp. Hard. 108.

Therefore, probate of a will of perſonal property, letters of adminiſtration, or a ſentence in a matrimonial cauſe in the one Court, or an adjudication of prize, &c. in the other, are evidence of the rights of the parties. The right to perſonal property, under a will, can be

(*n*) In the caſe of *Wheeler and Lowth, Guildhall*, 9 *Ann. (Com. Dig. Ev. c. 1.)* it was held by Trevor C. J. that if the bill and anſwer were recited in the decretal order, it was ſufficient; but if only ſo much is recited as is deemed neceſſary to introduce the decretal part, the bill and anſwer muſt be proved. *Dougl.* 579. And doubts have been entertained whether the decree under ſeal, which does not ſtate the bill and anſwer, can be read, without a foundation being laid for it by evidence of thoſe proceedings. Vide *Trowell* v. *Caſtle*, 1 *Keb.* 21.

(*o*) In *Mildmay* v. *Mildmay*, a doubt was made whether depoſitions in the Spiritual Courts were admiſſible; it is clear they are not, when taken in any cauſe not within their juriſdiction, but where they have juriſdiction, there ſeems no objection. Vide *Gilb. Law Ev.* 67.

proved

Rex. v. Inhabitants of Netherſeal, 4 T. Rep. 258. Allen v. Dundas, 3 T. Rep. 125. Noel v. Wills, 1 Sid. 359. Chichester v. Phillips, Sir T. Raym. 405.

proved by no other evidence than the probate; and while that exiſts, no perſon whatever can be permitted to ſhew that it was improperly granted, or after it is repealed to avoid any payment which has been made under it: But it may be ſhewn that the ſeal to the probate was forged, or that letters of adminiſtration have been repealed, to prevent any right being claimed under them, for that does not controvert the judgment of the Eccleſiaſtical Court, but ſhews that no ſuch judgment exiſts. So too, where an inferior Court grants probate, it may be proved that the teſtator left bona notabilia, for that ſhews that the Eccleſiaſtical Court had no juriſdiction, and conſequently, that the whole is void, as being *coram non judice.* (p)

Ibid.

From what has already been ſaid it may be collected that the probate of a will cannot be received as evidence for any purpoſe, in a queſtion concerning lands; for as to that they have no juriſdiction.

The judgment, or a ſentence of a Foreign Court is received in our Courts, as evidence of the right it eſtabliſhes, or the fact directly found by it. Indeed, when the party who claims the benefit of it applies to our Courts to enforce it, and voluntarily ſubmits it to their

Per Eyre, C. J. 2 H. Blac. 409.

(p) See further as to theſe ſentences, chap. ii. note (r)

juriſdiction,

jurisdiction, they treat it not as obligatory to the extent to which it would be in the country where it was pronounced, nor to the extent to which by our Law sentences and judgments are; and therefore though in an action upon a foreign judgment, the judgment is prima facie evidence of the debt, it is not conclusively so; but our Courts will examine into it, and for that purpose, receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, our Courts give entire faith and credit to the sentences of Foreign Courts, and consider them as conclusive: Therefore, if, on a libel against a ship, any question arises on the *Law of Nations*, and a foreign Court of Admiralty, acting on that Law, adjudges a ship to be a lawful prize, for breach of neutrality, being enemies' property, or other fact, which by the Law of nations is cause of forfeiture, the sentence is complete, and conclusive evidence of the *fact* on which it is founded against all the world; and if they state the *evidence* from which they drew the conclusion, no Court in this country can take into their consideration, whether such conclusion was right or otherwise. In this case, however, the adjudication is only evidence of the *conclusion* on which the condemnation is founded, such as the property belonging to an

Walker v. Whitter, Dougl. 1.

Per Eyre, ut supra.

Foreign Courts, vide Park's Insur. 353. Garcis v. Kenfington, 3 T. Rep. 290.

Christie v. Secretan, 8, T. Rep. 192.

Ibid.

enemy, or the like, and not of the *facts* ſtated by way of evidence.

Saloucci v. Woodmaſs Park, 413.

Alſo if a foreign Court of Admiralty condemns a ſhip as lawful prize without aſſigning any cauſe, it is evidence that ſhe was not neutral: but if the Foreign Court ſtate the facts, on which they found their condemnation, and it appears from thoſe facts, and alſo from the concluſion they have drawn, that the condemnation was not for any violation of the Law of Nations; but for not complying with ſome arbitrary regulation of their own; as where a belligerent ſtate, having made certain ordinances which had not been aſſented to by a neutral ſtate, ſeized a ſhip belonging to ſuch ſtate, and declared her prize, becauſe ſhe had not navigated according to thoſe ordinances, the ſentence is void altogether, and of no force in any Court of Juſtice. In like manner, as it is neceſſary that the *ſubject* ſhould be within their juriſdiction, it is alſo neceſſary that the *Court* itſelf ſhould be one regularly eſtabliſhed, and acknowledged by the law of nations, and not a mere arbitrary inſtitution, wherefore a condemnation before the Conſul of one country reſident in another, was conſidered as a mere nullity.

Saloucci v. Johnſon, Park, 415.

Calvert v. Bovil. 7 T. Rep. 523.

Mayne v. Walter, Park, 414. Pollard v. Bell, 8 T. Rep. 434 Bird v. Appleton, ibid. 562.

Havelock v. Rockwood, 8 T. Rep. 268.

The proof of theſe proceedings has generally been by copies under the ſeal of the Court in which they were; there ſeems no objection to the ſeal of a Court acting on the *Law of Nations*,

tions, being received as evidence of itſelf, but on principles it ſhould ſeem that to prove the ſeal of a mere municipal Court, ſome evidence ſhould be given of its authenticity. (*q*)

Judgments

(*q*) It was held in an anonymous caſe, 9 *Mod.* 66. that an exemplification of the proceedings of a Court in Holland, under the ſeal of the *ſtates*, was ſufficient evidence without further proof; but this, I conceive, is not an authority to ſhew that the ſeal of the *Court* in that country, acting on its own laws, would have been ſufficient, and the caſe of *Swinerton* v. *Goddard*, therein cited, ſeems to warrant the diſtinction; for it was there held, on appeal to the Houſe of Lords, that an exemplification of a judgment of the Court of King's Bench in England, which (for aught appearing to the contrary, was under the ſeal of that Court) was not ſufficient evidence of the judgment before the Court of Seſſion in Scotland. It is true, that the diſtinction taken by the Court was, that in the one caſe the record was the direct matter in iſſue, and in the other but inducement. But, in addition to this, it may be obſerved, that the public ſeal of one *ſtate* is matter of notoriety, and may be taken notice of by another, as part of the law of nations acknowledged by all; but when only the ſeal of a foreign *Court* is put to the copy, it ſhould ſeem that ſome evidence ſhould be given of that ſeal, being what it purports to be; for the Courts of England cannot judicially take notice of the *laws of other countries*, and therefore, where a contract is to be conſtrued according to the laws of the country in which it was made, witneſſes are examined to prove what thoſe laws are. 1 *P. Will.* 431. A diſtinction has long prevailed between public and private ſeals; the firſt (thoſe of the ſuperior Courts in this country) are conſidered, as is obſerved above, as part of the law of the country, and therefore are judicially taken notice of by its judges; but the ſeal of a private Court, or private individual ſhould be proved by evidence, (*vide Gilb. Law Ev.* 20. In *Moiſes* v. *Thornton*, 8 *T. Rep.* 303, it was held that the bare production of an inſtrument,

Inferior Jurisdictions.

Judgments in a Court Baron, County Court, or other *inferior Court*, though not records, are alſo evidence. In caſes, however, where it has been requiſite to prove their proceedings, the general practice has been to produce the book containing the original minutes, as well thoſe previous to the judgment, as the judgment, itſelf (for in the caſe of all inferior juriſdictions, whether eccleſiaſtical or civil, it muſt be ſhewn that the proceedings are regular,) and as it is not uſual to draw up ſuch judgments in form, this evidence has been held ſufficient to ſupport an action on the judgment.

Vide Com. Dig. Evid. C. 1.

Chandler v. Roberts, Excheq. Trin. 39. G. 3.

Having, when ſpeaking of the different Courts individually, but ſlightly mentioned the caſes in which judgments or ſentences of thoſe Courts would be evidence, I ſhall now proceed

ment, purporting to be a diploma under the ſeal of the Univerſity of St. Andrews' was not ſufficient; but in the caſe of *Doe dem Woodmaſs* v. *Maſon*. 1 *Eſp. Caſ. N. P.* 53. the ſeal of the Corporation of London was held to prove itſelf. From what is ſaid by the Court in *Moiſes* v. *Thornton*, it may be collected that the like evidence would not be ſufficient of the ſeals of other Engliſh corporations, and there appears good reaſon for making a diſtinction between them and that of the Corporation of London; its privileges have been confirmed by Parliament, and its ſeals is ſo common as to be known to almoſt every man. Letters of Adminiſtration under the ſeal of the Prerogative Court of Canterbury, prove themſelves in a cauſe reſpecting perſonal property. *Kempton* v. *Croſs*, *Caſ. Temp. Hard.* 108.

to

to collect into one view the general rules which are applicable to all.

The judgment, ſentence, or decree of the ſame Court, or of one *concurrent* juriſdiction *directly* upon the point, may be pleaded as a bar, or given in evidence as *concluſive* between the ſame parties *upon the ſame matter* directly in queſtion; therefore, where A. brought an action of *trover*, to recover perſonal property, and a verdict was given againſt him on the merits, this verdict was held to be *concluſive* evidence in an action of *aſſumpſit* for money had and received between the ſame parties, to recover the money produced by the goods; for though a different *form* of action, it was ſtill one in the *ſame degree*; it was the ſame queſtion of property, and the judgment was directly upon the point; but in real actions, a judgment in one action does not operate as a bar to another of a *higher nature*, than that in which it was given.

Vide 11 St. Tr. 261.

Hitchin v. Campbell, 2 Blac. 827.

Ferrer's Caſe, 6 Co. 7.

In like manner, a judgment of a Court of *excluſive* juriſdiction *directly* upon the point, is *concluſive* upon the ſame matter between the ſame parties coming *incidentally* in queſtion in another Court for a different purpoſe. But neither the judgment of a concurrent or excluſive juriſdiction is evidence of any matter which came *collaterally* in queſtion, though within their juriſdiction; nor of any matter

Vide 11 St. Tr. 261.

matter *incidentally cognizable*; nor of any matter to be *inferred by argument* from the judgment.

Judgments, that are merely on queſtions of property, are, as was elſewhere obſerved, evi- ante 26. dence only between the parties, or thoſe claiming under them; but thoſe in the Eccleſiaſtical Courts, on matrimonial cauſes, are evidence againſt third perſons. In theſe caſes, nevertheleſs, a ſtranger is always at liberty to ſhew that ſuch judgment, ſentence or decree, was obtained by fraud and colluſion between the parties to it; for fraud is an extrinſic collateral act, which vitiates the moſt ſolemn proceedings of Courts of Juſtice, and though it is not permitted to ſhew that a Court was *miſtaken*, it may be ſhewn that it was *miſled*; but the parties to them are not permitted to avail themſelves of their own fraud. (r)

Vide 4 Co. 29. a. Hervey's Caſe (note r.) Vide 11 St. Tr. 262.

When

(r) Conformably to theſe general principles, the following deciſions have taken place:

If a queſtion of legitimacy ariſe *incidentally* upon a a claim to a real eſtate, a ſentence of *nullity*, or one in *affirmance* of a marriage in the Eccleſiaſtical Court, is *concluſive* evidence againſt the parties, or thoſe who have acquieſced in the ſentence, and all claiming under them, as where A. and B. being married, C. libelled againſt the wife on a precontract, which the Spiritual Court enforced; and B. and C. afterwards married, living the firſt huſband, and had a ſon, who brought an ejectment, and made out his title as heir to his grandfather;

When any *public meaſure* has been adopted by the government of this country, it is uſual Acts of State.

to

grandfather; and it was held that the ſentence was *concluſive* evidence of his legitimacy (*Bunting's Caſe*, 4 *Co* 29;) and in like manner, where two perſons had married within the age of conſent, and the Eccleſiaſtical Court pronounced a ſentence of divorce on that ground, this ſentence was held concluſive of that fact, as againſt the children of the marriage, and deſtroyed their legitimacy, (*Kenn's Caſe*, 7 *Co.* 41.) So a ſentence in a cauſe of *jactitation*, has been held concluſive evidence againſt the iſſue in an ejectment. *Jones* v. *Bow*, *Carth.* 225. And where an action has been brought upon a contract of marriage, or for adultery with the plaintiff's wife, a ſentence in the Eccleſiaſtical Court againſt the contract in the one caſe, (*Dacoſta* v. *Villa Real*, 2 *Stra.* 961.*) or declaring the ſuppoſed wife free in a jactitation cauſe in the other, (*Clewes* v. *Bathurſt*, 2 *Stra.* 960.) is concluſive evidence.

So a ſentence of expulſion unappealed from given in evidence on an indictment for aſſaulting a fellow-commoner of Queen's College, Cambridge, by turning him out of the gardens, is *concluſive* for the defendant and conſequently evidence on the part of the proſecutor to prove the irregularity of the ſentence is inadmiſſible (*Rex* v. *Grunden*, *Cowp.* 315.) And a conviction before a magiſtrate, having competent juriſdiction, is, till quaſhed or reverſed, concluſive evidence in favour of the juſtice in an action againſt him for falſe impriſonment. (*Strickland* v. *Ward*, *Winchester Summer Aſſizes*, 1757, *cor. Yates*, *J.* 7 *T. Rep.* 633, *note.*)

In all theſe caſes the parties to the ſuit were parties to the ſentence or conviction, or had acquieſced under it, or claimed under thoſe who ſtood in that ſituation; and for the ſame reaſon in the caſe of the *Duch-*

eſs

* This caſe was before the ſtatute 26 G. 2, c. 3. by the 13th ſect. of which ſtatute, it is enacted, that no ſuit ſhall be had in the Eccleſiaſtical Court, to compel a celebration of marriage, by reaſon of any contract.

to announce ſuch meaſure to the public by means of a gazette, which is publiſhed under the

ſs of Kingſton, *Lord Apſley* conſidered the ſentence of the Eccleſiaſtical Court declaring her free from *Mr. Harvey*, to be ſo concluſive againſt the heir at law, and next of kin of the Duke, as to be pleadable in bar to a bill brought by them to ſet aſide his will on the ground of fraud in the Ducheſs, in impoſing herſelf upon him as a ſingle woman (*Ambl.* 756;) but when the ſame ſentence was offered as *concluſive* evidence againſt the charge of bigamy, the Houſe of Lords held that it was not ſo; firſt becauſe the King was no party to the firſt ſuit, *nor could become ſo*; and ſecondly, becauſe the Eccleſiaſtical Court had no judicial cognizance of crimes; vide 11 *State Tr.* 261. In like manner in *Prudham* v. *Phillips*, (cited *Ambl.* 762, and ſeveral times in the *Ducheſs of Kingſton's* caſe) it was held that a ſentence in the Eccleſiaſtical Court annulling a marriage might be avoided by third perſons on account of fraud and colluſion in the parties, though the parties themſelves were eſtopped from ſhewing their own fraud. So though a judgment of ouſter againſt one corporator is admiſſible againſt another deriving title through him, it is not concluſive. *Rex* v. *Grimes*, 5 *Burr.* 2598.

But in an action againſt *Mr. Harvey*, by a creditor of his ſuppoſed wife (they living ſeparate,) he ſhewed a ſentence in a cauſe of jactitation declaring againſt the marriage, and that not being impeached by the creditor, was conſidered as concluſive evidence againſt the marriage, though it was afterwards reverſed on appeal. Vide 11 *State Tr.* 235.

In caſes where every perſon has an opportunity of coming into Court, and being made a party to the ſuit, as in all proceedings *in rem*, and probate of wills, the ſentence or grant of probate binds *all perſons*, and none can be permitted to impeach the proceedings in another ſuit, when it comes incidentally in queſtion. Vide 11 *State Tr.* 218, 222.

The reader, who wiſhes for further information on this

the ſanction and controul of government; and of any *act of ſtate* ſo announced, this gazette is of itſelf ſufficient evidence; the *King's Proclamations, addreſſes* from the people to the Crown, and the like, may be proved in this manner without a production of the proclamation, or addreſs itſelf, for theſe being matters of public notoriety, communicated to the public in a known preſcribed form, the law pays ſuch attention to the eſtabliſhed rules of office, as not to call for higher evidence than that to which all mankind look for information on the ſubject. For the ſame reaſon, *proclamations*,[1] and the *articles of war*,[2] as printed by the King's printer, are received as ſufficient evidence of them. And the Regiſter of the Navy Office,[3] with proof of the method there uſed, to return all perſons dead with the mark *Dd*, is ſufficient evidence of death; as is the daily book[4] of a public priſon, to prove the time of a priſoner's diſcharge; or the log-book of a man of war, to prove when a ſhip became part of her convoy.

Rex v. Holt, 5 T. Rep. 436.

1. Bul. N. P. 226.

2. Rex v. Withers, cited 5 T. Rep. 442.

3. Bul. N. P. 249.

4. Rex. v. Aikles. Leach, Caſ. 435.

D'Iſraeli v. Jowett, 1 Eſp. Caſ. 427.

Matters of hiſtory, long ſince tranſacted, of which no perſon can give teſtimony, may be proved by ancient hiſtories of the times in

Hiſtory.

this intricate and important ſubject, will find many other caſes collected in the *Ducheſs of Kingſton's* caſe, in *State Trials, vol.* 11, *Ambl.* 762, and *Nolan's Stra.* 960, note 1, and much learning in the reports of the ſeveral caſes referred to, ante.

which they were tranſacted; as where a deed was produced, purporting to be made in the reign of Philip and Mary, it was permitted to the other party to ſhew by ancient chronicles, that King Philip did not take the ſtile in the deed, at the time it purported to be made, and conſequently, that it was not an authentic inſtrument; but where a particular cuſtom came in queſtion, Cambden's Britannia was not permitted to be read in evidence.

Neale v. Fry, cited Salk. 281.

Stainer v. Droitwich, ibid.

Surveys, taken on public occaſions, are alſo evidence to aſcertain the rights of individuals not named in them; thus doomſday-book, which was a ſurvey of the King's lands, made in the time of William the Conqueror, is the only evidence to prove whether a manor is held in ancient demeſne, that is, whether it was part of the foccage tenure in the hands of Edward the Confeſſor, or not; and ſo high is the credit of this book, that the inſpection is made by the Court. So if a queſtion ariſe as to the extent of the Ports, there lies in the Exchequer a particular ſurvey which aſcertains it; and in many inſtances, where a commiſſion has been confined to a particular place, it has been received as admiſſible evidence; as where a commiſſion iſſued out of the Exchequer in the reign of Queen Elizabeth, directing commiſſioners to enquire whether a prior was ſeized of certain lands, as parcel of a manor; and whether,

Surveys and Inquiſitions. Hob. 188.

Gilb. Law Ev. 78.

Tooker v. Duke of Beaufort, 2 Burr. 846.

whether, after the diſſolution of the priories, the crown was ſeized, with directions to ſummon a jury, an inquiſition taken under it, and the depoſitions of the witneſſes were held to be admiſſible, though not concluſive evidence of the fact. In like manner an inquiſition taken in the time of the Commonwealth, by order of the then exiſting Government, to aſcertain the extent of lands belonging to the Prebend of the moor of St. Paul's, was received againſt a perſon claiming under them as evidence of the extent of their rights; and that taken under the direction of the houſe of Commons in the year 1730, as concluſive evidence of the tenure and fees of the different offices noticed in it. And even when the commiſſion has been loſt, the ſurvey taken under it has been allowed as evidence. Theſe, and many other caſes of a ſimilar nature, have proceeded on the ground that the act being done under the direction of the public, for the purpoſe of determining a public queſtion, they are entitled to a degree of credit, which no act of an individual is.

Doe dem Powell v. Harcourt, K. B. Sittings after Eaſt. Term 39 G. 3. Append.

Green v. Hewitt, Peake N. P. 182. Vicar of Killington v. Tr. Col. 1 Wils. 170.

Inquiſitions taken before the ſheriff, &c. on ordinary occaſions, are of very different authority; they are in their nature traverſable, and are therefore ſeldom admitted as evidence againſt third perſons. In one caſe, the Court of King's Bench were equally divided on the queſtion, whether the Coroner's Inqueſt, where-

Vide 2 H. Blac. 437.

Jones v. White 1 Stra. 68.

by

by a man was found to be *non compos mentis*, was admiſſible againſt his executrix as evidence of his inſanity; and in a much later caſe it was determined, that an inquiſition taken by the ſheriff, to aſcertain to whom goods ſeized by him, under an execution againſt A. belonged, by which the property was found to be in B. was no evidence in his favour in an action brought by him againſt the ſheriff, who had been indemnified by the creditor.

Latkow v. Eamer 2 H. Black. 437.

Pariſh Regiſters. Morris v. Miller, 4 Burr. 2057.

The *regiſter* kept in churches of *births, marriages and burials*, is alſo evidence, and in all civil caſes, except actions for criminal converſation, a marriage may be proved by reputation; but in this caſe, and on indictments for bigamy, either ſome perſon preſent muſt be called, or the original regiſter or a copy of it produced, *(f)* and the parties may be identified

Birt v. Barlow. Dougl. 162.

(f) In *May* v. *May*, 2 *Stra.* 1073, on a queſtion of legitimacy, it appeared that a general regiſter book was kept in the pariſh, into which the entries of baptiſm were made every three months, from a day-book, into which they were made at the time. In the day-book were put the letters B B, which were ſaid to ſignify baſe born; but theſe letters were not inſerted in the regiſter-book. Probyn and Lee, juſtices, were of opinion, that the regiſter-book being the public book, was to be conſidered as the original entry from which evidence was to be given, and that it could not be controuled or altered by any thing appearing in the day-book. *Page*, J. was of contrary opinion.

The following caſe was decided upon the ſame principles:

Rex v. *Head, Worceſter Spr. Aſſiz.* 1769, *cor. Noel, J. MS.* In an information for bribery, the proſecutor,

ed by any one acquainted with them, whether preſent at the marriage or not. But the books of the Fleet are not, in any caſe, received as evidence of a marriage, not becauſe a marriage celebrated there was not good, for ſuch it clearly was before the marriage act; but becauſe the manner in which thoſe marriages were celebrated, and the conduct of the perſons who without any legal authority, aſſumed the power of regiſtering them, have thrown ſuch an odium on thoſe books, as to take from them even the authority of a private memorandum.

So ruled by Lord Kenyon in Reed v. Paſſer, Peake's Caſ. 231, Eſp. 213, S. C. and by Lord C. J. De Grey in Howard v. Burtonwood, C. B. Sittings at Weſtminſter after Trin. T. 1776; and previouſly by Lord Hardwicke and Lord C. J. Lee; but in Doe dem Paſſingham v. Lloyd, Shrewſb. Summer Aſſiz, 1794, Mr. J. Heath admitted them in evidence.

The *Rolls of Courts Baron*, are alſo received to prove the admiſſions, &c. of tenants, and either an examined copy, or one ſigned by the ſteward, may be read; ſo alſo rolls which con-

Rolls of Courts Baron Bul. N. P. 247.

tor, to prove the party a freeman of Eveſham, produced upon a 2s. ſtamp, a copy of a looſe paper upon a file, which the witneſs ſaid was alſo on a 2s, ſtamp, to this effect: "Borough of Eveſham, A. B. admitted to his freedom ſuch a day." It appeared that there was a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admiſſion, and which was made when the party was originally omitted; but this was not on ſtamp in the book; and it was objected, that this being the original book of the corporation, a copy of *this* ſhould have been produced; but it appearing that ſuch entry in the book was never upon ſtamps, but the ſhort entries were filed upon ſtamps, and kept amongſt the corporation papers, *Noel, J.* ſaid, that this entry being the only effectual act, as having that which the law requires, viz. the proper ſtamp, muſt be looked upon as the proper and original act of the corporation, and therefore a copy of it was good evidence.

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Doe dem Maſon v. Maſon, 3 Wils. 63. Roe dem Beebee v. Parker, 5 T. Rep. 26.

tain entries of deſcents, &c. are evidence between the tenants to prove the cuſtomary courſe of deſcent within the manor; and even an entry on an ancient roll of a finding by the homage what the cuſtoms were, though not accompanied by any particular inſtance, or ſupported by other evidence, is itſelf admiſſible evidence to prove the cuſtom; for this not being the claim of a private individual, but as it were the *lex loci*, tradition and received opinion, is evidence of it. On the ſame principle a cuſtomary of the manor of great antiquity, though not properly a Court roll, nor ſigned by any perſon, but delivered down with the rolls from ſteward to ſteward, has been deemed good evidence.

Dem dem Goodwin v. Spray, 1 T. Rep. 466.

Terriers.

Similar to Court Rolls and Cuſtomaries, are ancient *terriers or ſurveys* of a pariſh or manor, which are either eccleſiaſtical or temporary. The eccleſiaſtical terriers are ſurveys made by virtue of the 87th canon, and are thereby ordered to be kept in the biſhop's regiſtry; and Godolphin adds, that it may be convenient to have a copy exemplified, and kept in the church cheſt, wherefore, it was in one caſe holden, that a paper purporting to be a terrier, found in the charter cheſt of Trin. College, Cambridge (who were land holders in a pariſh) was no evidence to diſapprove a modus: but as againſt one of the Prebendaries of Litchfield, a terrier found

Repertorium Canonicum Append. 12. Atkins v. Hutton, 2d Anſtr. 386, Miller v. Forſter, E. B. ib. 387, note.

found in the regiſtry of the Dean and Chapter of Litchfield, was held ſufficient evidence.

It is alſo ſaid, that againſt the parſon, it is, in all caſes, ſtrong evidence, but for him it is never admitted, unleſs ſigned by the church-wardens; and, if they are of his nomination, by ſome of the ſubſtantial inhabitants of the parith alſo. Theory of Evidence, 45 Bul. N. P. 248.

Ancient maps have generally been claſſed under this head of *public writings* not of record, though perhaps they would more properly have been conſidered as *private inſtruments*; however, as theſe are in ſome degree analogous to terriers, I ſhall here obſerve that an ancient map will be received as evidence where it has accompanied poſſeſſion, and agreed with the boundaries as adjuſted by ancient purchaſes. If two manors be in the hands of the ſame perſon, and a map is made by him, and afterwards one of the manors is conveyed to another perſon, and then, at a diſtant time, diſputes ariſe as to the boundaries, the map ſo taken will be evidence; but if the perſon, under whoſe direction the map was taken, was poſſeſſed of only one manor, or a lord deſcribes the boundaries of his waſte, or the church-wardens cauſe a copper-plate map to be made, wherein they deſcribe land which an individual claims, to be a public highway; in any of theſe caſes, the map ſo taken is not evidence againſt

Maps. Yates v. Harris, Hil. An. 1702, Gilb. Law Ev. 78.

Bridgman v. Jennings 1 Ld. Raym. 734.

Ibid.

Pollard v. Scott, Peake N. P. 48.

againſt the rights of perſons not parties to the making of it.

Papal Licence and Bull.

The *Pope's Licence*, without the King's, has been held good evidence of an impropriation, becauſe, anciently the Pope was taken for the ſupreme head of the church, and, therefore, was holden to have the diſpoſition of all Spiritual Benefices, with the concurrence of the patron, without any regard of the prince of the country, and theſe ancient matters muſt be judged according to the error of the times in which they were tranſacted.

Cope v. Bedford, Palm. 427.

Palm. 38.

So alſo the *Pope's Bull* is evidence, upon a ſpecial preſcription to be diſcharged of tythe, where it is contended that the lands belonged to a particular monaſtery, and were diſcharged at the time of the diſſolution; for then they continue diſcharged by the Act of Parliament: but it is no evidence to prove a general preſcription, which can only be from time immemorial, becauſe it ſhews the commencement of the cuſtom. An exemplification under the biſhop's ſeal, is good evidence of the pope's bull.

Sir T. Read's Caſe, cited Hard. 118.

Corporation Books.

Corporation Books, concerning the public government of a city or town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them; and examined copies of them being evidence, a Court of Juſtice will not order the production

Rex v. Metherſall 1 Stra. 93.

production of the originals, unleſs a particular ground for that purpoſe is laid before them. Where an old agreement was in the Bodleian Library, whence the Oxford ſtatutes prohibit its removal, a copy was received in evidence; but, in general, that which is in its nature a private inſtrument, will not, by belonging to a public body, and remaining in their cuſtody for a number of years, gain that degree of credit, which entitles a copy of it to be read in evidence; and, therefore, where a letter, fifty years old, was found in a corporation cheſt, the Court held that the original muſt be produced.

Brocas v. Mayor, &c. of London, 1 Stra. 307.

Downes v. Moreman, Bunb. 183.

Rex. v. Gwin, 1 Stra. 401.

Public books of another deſcription, have, of late years, come into uſe, which, though in one point of view, they do not in the leaſt reſemble records, but are rather memoranda of the contracts of individuals; yet, as they concern the public in general, and are neceſſarily confined to one place, judges have, by analogy to the caſe of records, permitted copies to be read in evidence. Thus it has been held, that to prove a transfer of ſtock in the *public funds*, copies from the *Bank books* are good evidence; and the like ſeems to be the caſe with reſpect to the books of the *Eaſt India Company* (though this point has not been expreſsly decided,) for they are equally within the principle,

Bank Books.

Brettonv. Cope. Peake N.P. 30.

vide Doug. 593, note.

3 Salk. 154.

that " wherever an orignal *is of a public na-* " *ture*, and would be evidence if produced, an " immediate ſworn copy thereof is evidence."

SECTION III.

Of Inſtruments of a private Nature.

WE now proceed to the conſideration of written evidence of a very different deſcription from that noticed in the preceding ſections, viz. the mere private inſtruments of the parties, or others through whom they claim. We have obſerved, that documents of a public nature, are for the moſt part confined to a particular ſpot, and liable to be called for by ſeveral perſons at the ſame time; for which reaſon, and alſo on account of the authority which the law gives to acts done under its immediate ſanction, Courts of Juſtice, in ſuch caſes, permit examined copies to be given in evidence. But of private deeds, or other inſtruments, the production of the original (*s*,) if in exiſtence, and

10 Co. 92.

(*s*) It has been ſaid, that even the counterpart of a deed cannot be read in evidence, without ſome account of the original. (*Salk.* 287.) and the general practice is to give notice to a tenant, to produce the original leaſe in an action by his landlord againſt him, but I conceive that there can be no reaſon why the copy, or rather the duplicate of the deed executed by the party himſelf, ſhould not be evidence of the whole contents of it *againſt him*; though if the demiſe came in queſtion in and

and in the power of the party uſing it, is always required; till which done, no evidence whatever of the contents can be received; but where the original has been deſtroyed, or loſt by accident, as where an original award was loſt in a mail which was robbed; or being in the hands of the adverſe party, notice has been given him to produce it, then an examined copy, or even parol evidence of the contents, being the beſt evidence in the power of the party, is received; it being firſt proved, in caſe a copy is offered, that the original, of which it purports to be a copy, was a genuine inſtrument.

Vide Read v. Brookman, 3 T. Rep. 151. Robinſon v. Davies, 1 Stra 526. Young v Holmes, 1 Stra. 70.

Goodlier v. Lake, 1 Atk. 446.

The inſtrument being produced, if there be a ſubſcribing witneſs who is living, and in a ſituation to be examined, he alone is competent to prove the execution, becauſe he may know and be able to explain facts attending the tranſaction which a ſtranger may not; and for this reaſon, it has been held that a [1]confeſſion or acknowledgment of the party to the deed, will not excuſe this teſtimony. (*t*) This rule of evidence extends to all caſes, whether the deed be

[1] Abbot v. Plumbe, Doug. 216. Laing v. Raine, 2 Bos. and Pul. 85.

an action againſt the leſſor, or a third perſon, it certainly would not. In a late caſe, where a declaration for not ſtamping an indenture of apprenticeſhip, ſtated that A. put himſelf apprentice to the defendant, the part of the deed executed by him, was held ſufficient evidence without production of, or notice to produce the original deed executed by A. *Burleigh* v. *Stibbs*, 5 *T. Rep.* 465.

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an exiſting inſtrument or cancelled,[2] and even if it be loſt,[3] and parol evidence given of its contents, the ſubſcribing witneſs, if known, muſt be called; but if he is not known, any other perſon who has ſeen it, is a competent witneſs.[4]

Subſcribing witneſſes are not neceſſary to the validity of a deed,[4] and, therefore, if there be none, or the ſubſcribing witneſs being called, denies having ſeen the inſtrument executed;[5] (*u*) or it appears that the name of a fictitious perſon is put as a witneſs, by the party himſelf who executed the deed, or the perſon really atteſting is at the time of the execution of the deed intereſted in it, and continues ſo at the time of trial, in theſe caſes proof of the hand-writing of the party will be ſufficient; and if the inſtrument, on the face of it,

2 Bretton v. Cope, Peake N. P. 30.

3 Keeling v. Ball, Appendix. 37 Geo. 3.

4 Comyn's Dig. Fait, vide 1 Lev. 25.

5 Grellier v. Neale, Peake N. P. 146. Dougl. 216. Lowe v. Jolliffe, 1 Black. 365. Faſſet v. Brown, Peake, N. P. 23. Swire v. Bell, 5 T. Rep. 371.

(*t*) By this muſt be underſtood a mere verbal acknowledgment, and not that deliberately made in a courſe of juſtice, and, therefore, when a man in his examination before commiſſioners of bankruptcy, admitted the execution of a bill of ſale, which was afterwards made the ground of a commiſſion, this acknowledgment was held ſufficient evidence in an action of trover for the goods againſt him, without calling the ſubſcribing witneſs, *Bowles* v. *Langworthy*, 5. *T. Rep.* 366. Vide etiam *Laing* v. *Raine*, ſupra.

(*u*) It is not neceſſary that he ſhould actually *ſee* the party execute; for if he be in an adjoining room, and the party after executing, brings it to him, tells him that he has done ſo, and deſires him to ſubſcribe his name as a witneſs, that is ſufficient. *Park* v. *Mears*, 2 *Bos. and Pul.* 217.

purports

purports to be ſealed and delivered, ſuch proof alone is ſtrong evidence for a Jury to preſume, that the other formalities were complied with. It has, indeed, been ſaid in one book of great authority, and repeated in another of more modern date, that, "though the "deed be produced under hand and ſeal, and "the hand of the party be proved, yet that is "no full proof of the deed, for the delivery is "neceſſary to the eſſence of the deed, and there "is no proof of the delivery, but by a witneſs "who ſaw it;" but I conceive that the authority of this dictum, for ſuch merely it is, is deſtroyed by the ſubſequent deciſions. At the time when writing was but little practiſed among men, and when contracts were authenticated by ſeals only, the rule was not without its uſe, for ſeals might be ſo eaſily counterfeited, or affixed by any perſon, that it was requiſite Courts of Juſtice ſhould be particularly careful in receiving evidence of them; but the characters of hand-writing are in general ſo diſtinguiſhable from each other, that they cannot eaſily be miſtaken.

Gilb. Law Ev. 161. Bul. N. P. 254.

When the ſubſcribing witneſs is dead, or is reſident in a foreign country,[1] (*x*) or by the commiſſion

1. Coghlan v. Williamſon, Dougl. 93. Holmes v. Pontin, Peake N. P. 99. Barnes v. Trompowſky, 7 T. Rep. 265. Adams v Kerr, 1 Bos. and Pul. 360.

(*x*) Now by Stat. 26 *G.* 3. *c.* 57, *ſ.* 38, Deeds executed in the *Eaſt-Indies*, and atteſted by perſons reſident there, may be proved by evidence of the hand-writing of the obligor and witneſſes, and that the witneſſes are reſident there: and the like proof is made ſufficient

commiſſion of ſome crime,[2] or the accrual of ſome intereſt,[3] ſubſequent to the execution of the inſtrument, has become an incompetent witneſs; proof of his hand-writing is the next beſt evidence which can be given. In the firſt caſe, viz. where he is dead, this alone has been held ſufficient; but in the others, it has been uſual, and ſeems to be neceſſary (*y*) to prove the hand-writing of the party to the deed[4] alſo, and, in all theſe caſes, a foundation muſt firſt be laid, by proving the ſituation in which the witneſs ſtands.

2. Jones v. Maſon, 2 Stra. 833.

3. Goſs v. Tracy, 1 P. Wil. 289 Godfrey v. Norris, 1 Stra. 34.

4. Vide Wallis v. Delancey, 5 T. Rep. 266. note c. Gilb. Law Ev. 105. Wallis v. Delancey, ſupra.

It frequently happens, that there is more than one witneſs to a deed, and, in the caſe of a will of lands, the ſtatute of frauds expreſsly requires three witneſſes; nevertheleſs, in theſe caſes, it is ſufficient if one be called; but if they are all dead, the deaths of all ſhould be proved before evidence is received of the hand-writing of either, for until it appears that neither of them is living, the other is not the beſt evidence which the nature of the caſe will admit of.

But it may be aſked, how is the hand-writ-

ſufficient evidence in the *Eaſt-Indies* of any deed executed in *Great-Britain*.

(*y*) In the caſe of *Adams* v. *Kerr*, 1 *Bos.* and *P.* 360. where a bond was executed abroad, one witneſs was dead, and the other reſident abroad, proof of the hand-writing of the deceaſed witneſs, was held ſufficient without proof of the hand-writing of the other, or the obligee. Sed vide *Wallis* v. *Delancey*, ſupra.

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ing of a man to be proved, where no man ſaw him write his name to the inſtrument, which is to be produced in evidence? In this caſe it is plain, that no poſitive or direct evidence of the fact can be given, and, therefore, the law ſtill adhering to its general rule, that the beſt evidence *the nature of the caſe will admit of* is ſufficient, is ſatisfied with circumſtantial and preſumptive evidence. The hand-writing of every man has ſomething peculiar and diſtinct from that of every other man, and is eaſily known by thoſe who have been accuſtomed to ſee it, and, therefore, the *belief* of ſuch perſons, is always received as preſumptive evidence of the fact, either in civil or criminal caſes. But the perſon who ſpeaks to that belief, muſt have ſuch a knowledge as enables him to form it, ſuch as having ſeen the party write, or having received letters from him in a courſe of correſpondence; barely having ſeen letters purporting to be franked by him, or other papers, which he has no authentic information are of the party's hand-writing, is not ſufficient.

Dr. Henſey's Caſe, 1 Burr. 642.

Gould v. Jones, 1 Blac. 384. Cary v. Pitt, Eſq. K. B. Sittings at Weſtm. after Eaſter Term, 37, Geo. 3. Append.

In forming this belief, the witneſs ought to ſpeak ſolely from the impreſſion which the hand-writing itſelf makes upon his mind, without taking into his conſideration any extrinſic circumſtance; and therefore, in a caſe where a witneſs ſaid that he ſhould, looking at the hand-writing, think it was that of the party whoſe

Dacoſta v. Pym. Sit. at Guildhall, after Trin. Tm. 37 Geo. 3. K. B. Balcetti v. Serani, Peake N. P. 142. Graft v. Ld. Brownloe Bertie.

whoſe name it bore, but that from his knowledge of him he thought he could not have ſigned ſuch a paper, it was held that this was prima facie evidence of the hand-writing; and on the ſame principle, where it was contended, that the paper produced was the forgery of a third perſon, evidence that ſuch third perſon had forged the defendant's name to other inſtruments of a ſimilar nature, was held not to be admiſſible. (z)

The proceſs by which the mind arrives at the belief of hand-writing, being the recollection of the *general character* from an acquaintance, by frequently ſeeing it, and not from the formation of *particular letters*, or a ſingle in-

(z) *Graft* v. *Lord Brownlow Bertie*, adminiſtrator of Lady Mary Greathead, ſittings at *Weſtm.* after Trin. 1777. *MS.* Debt on bond, plea non eſt factum. The bond was atteſted by Dadley only, he being dead, and his hand-writing proved. For the defendant, it was offered to prove, that *other bonds* atteſted by Dadley were forged, which bonds were produced; but Mr. Dunning, for the plaintiff, ſtrongly objected to this evidence, becauſe plaintiff could not be prepared to ſupport the authority of other deeds. *Lord Mansfield.* —Dadley's hand is proved as evidence of all he would have ſaid if living, and if he had been here, they might have produced other bonds, and aſked whether they were his ſignature, and whether he ſaw the bonds executed; and if he had ſaid yes, they might have called other witneſſes to prove that they were not given. Lord Mansfield, at laſt, rejected the evidence, with liberty for the defendant to move the Court; but the jury, on the evidence that was given, found a verdict for the defendant.

ſpection,

ſpection, Courts of Juſtice have wiſely rejected all evidence from *compariſon of hands*; they will not, therefore, permit two papers, one of which is proved to be the hand-writing of a party, to be delivered to a jury for the purpoſe of comparing them together, and thence inferring that the other is alſo of his hand-writing; but, in caſes where the antiquity of the writing makes it impoſſible for any perſon to prove it, from having actually ſeen the perſon write, the evidence of a man who has had opportunities of making himſelf acquainted with the *character*, by frequent inſpection, has been admitted: and, therefore, where a parſon's book was produced to prove a modus, he having been long dead, a witneſs who had examined the pariſh books, in which his name was written, was permitted to ſwear to the ſimilitude; for it was the beſt evidence the thing was capable of.

Macferſon v. Thoytes, Peake N. P. 20.

Brookband v. Woodley, ib. note a.

Per Hard. C. 6 Dw. 1746. Bul. N. P. 236.

Where witneſſes have been called to prove the ſimilitude of hand-writing, and other witneſſes have, from the ſame premiſes, drawn a different concluſion, it has in ſome caſes before a jury, whoſe habits of life have accuſtomed them to the ſight of hand-writing, been permitted to hand up other papers confeſſedly of the parties' hand-writing, for them to inſpect and compare them together: this mode of proceeding, however, ſeems rather a departure from the ſtrict rules of evidence, and before an illit-

Alleſbrook v. Roach, K. B. Sittings at Weſtmin. after Trin. Tm. 1795. M. S. 1 Eſp. Caſ. 351. S. C.

Goodtitle dem Revet v. Braham, 4 T. Rep. 497.

erate jury would probably not be adopted. In one caſe which came before the Court, the party, who contended that the hand-writing was a forgery, was permitted, after a great deal of other evidence, to examine a clerk at the Poſt-office, whoſe buſineſs it was to inſpect franks and detect forgeries, to prove that from the appearance of the hand-writing, it was in his opinion, a forgery, and not a genuine hand writing; but in a ſubſequent caſe, Lord Kenyon held that ſuch evidence was wholly inadmiſſible, and obſerved, that though in *Revet* and *Braham* it was admitted, yet that in his direction to the jury, he had laid no ſtreſs at all upon it.

Cary v. Pitt, ſupra.

In the beginning of the preſent chapter, I had occaſion to obſerve, that where an original inſtrument was in the hands of the party, againſt whom it was intended to be given in evidence, no evidence whatever of its contents could be received, until notice had been given to produce it, which notice may be delivered either to the party or his attorney, even in an information or penal action.

Attorney General v. Le Merchant, 2 T. Rep. 201, note a. Cates v. Winter, 3 T. Rep. 306. Cowen v. Abrahams, Eſp. N. P. Caſe, 50. Shaw v. Markham, Peake's N. P. 165.

If trover be brought for a note or bill of exchange, notice muſt be given to produce the original, before evidence of its contents is admiſſible; and in like manner a letter informing a man of the diſhonour of a bill, or the like, cannot be proved until a ſimilar notice has been given. This rule is founded on the wiſeſt principles of juſtice, for the party in whoſe hands

hands the papers were, not deeming them neceſſary for his own caſe, might not otherwiſe bring them with him; but the rule being adopted for the purpoſe of preventing a miſrepreſentation of any of the facts which form the foundation of the action, it follows that any written paper delivered to a party after it is commenced, or for the mere purpoſe of a formal notice previous to its commencement, and of which a copy is kept, are not within it; it being a general rule that no notice is neceſſary to produce another notice, otherwiſe it might be extended ad infinitum; and, indeed, in the caſes of notices given to a tenant to quit, to a magiſtrate previous to the commencement of an action againſt him, a demand in writing of a warrant, made previous to the commencement of an action againſt an officer, or the like, where a copy ſigned by the ſame perſon who ſigned that delivered to the party, is kept by a witneſs, each copy is conſidered as a duplicate original. The caſe of an attorney's bill delivered under the ſtatute, is ſimilar in principle, and may be proved in like manner without notice to produce that delivered.

Jory v. Orchard, 2 Boſ. and Pul. 39.

Ibid. Anderſon v. May, 2 Boſ. and Pull. 237

It has been held in ſeveral caſes, that if the party to whom notice has been given to produce an inſtrument, produces it accordingly, the other party is entitled to read it without further evidence of its execution. As againſt the

Thompſon v. Jones, cited 2 T. Rep. 43. Paſſel v. Godfall, ib. 44.

the party to it, there ſeems no poſſible objection to this rule; for he muſt know whether he ever executed ſuch an inſtrument or not, and the plaintiff not knowing who were the ſubſcribing witneſſes cannot come prepared to prove the execution. In one caſe, this rule was extended to third perſons, into whoſe hands an indenture had been delivered; but the rectitude of this deciſion has been doubted by very high authority.

Vide 2 T. Rep. 43.

Rex v. Inhabitants of Middlezoy, 2 T. Rep. 41.

Per Lord Kenyon in Rex v. Inhabitants of Dolton, M. 41. G. 3.

There are ſome inſtances in which the law permits inſtruments to be read in evidence without proof of the execution. In moſt caſes it would be abſolutely impoſſible, after a great length of time, to prove the execution of a deed, or even the hand-writing of the parties. It is neceſſary that a period of limitation ſhould be fixed, otherwiſe new queſtions would daily ariſe, and therefore Courts of Juſtice have laid it down as a rule, that a deed of above *thirty* years ſtanding, requires no further proof of its execution than the bare production, provided the poſſeſſion has been according to the proviſions of the deed, and there is no apparent eraſure or alteration on the face of it; and livery of ſeiſin, though not indorſed on a feoffment, will, after ſuch a lapſe of time, be alſo preſumed. In like manner, if a bond of that date is found amongſt the papers of an inteſtate, or public company, the ſame preſumption ariſes in

Bul. N. P. 255.

Bul. N. P. 256.

Forbes Ad. v. Whale, Guildhall, ſitt. after Mich. T. 1764.

in its favour from the place where it was found. (a) But as this rule is founded on preſumption, it does not apply to caſes where there are circumſtances to raiſe a contrary preſumption, as if the poſſeſſion has not been according to the deed, or if the deed appear on the face of it to be razed or interlined, or a man conveys a reverſion, firſt to one, and then by a ſubſequent deed conveys it to another, and the ſecond purchaſer proves his title; in all theſe caſes it will be incumbent on the party to give the ordinary evidence of the execution of his deed, for the preſumption from the antiquity of the deed is deſtroyed by the oppoſite preſumption; in the one caſe, that ſome unfair alteration has been made in the deed; in the other, that the perſon having the poſſeſſion was alſo entitled; for the law will not raiſe a preſumption that a man would be guilty of ſo manifeſt a fraud as to convey the ſame eſtate to two different people.

Governor and Co. of Chelſea Water-works v. Cowper, K. B. Sittings after Hil. Tm. 1795. Eſp. 276. S. C. Chattle v. Pound, 1701, Gilb. Law Ev. 103.

Another inſtance in which a deed is conſidered as proved without calling witneſſes, is where one deed recites another; in this caſe, the recital is ſufficient evidence of the recited deed, againſt the party to that wherein it is recited, or againſt any one claiming under him;

Ford v. Grey, 1 Salk. 286.

(a) In *Rex* v. *Inhabitants of Ryton*, 5. *T. Rep.* 259, it was held, that the production of a pariſh certificate thirty years old, was ſufficient, without evidence of the place where it came from.

but

but againſt a ſtranger to it, evidence of the actual execution of the firſt deed muſt be given, for the admiſſion of another perſon cannot affect him, and if ſuch evidence were to be admiſſible, deeds might eaſily be fabricated by falſe recitals.

A deed, or other inſtrument being produced and proved, is concluſive upon the rights of the parties, and no parol evidence can be received to contradict it: but if an ambiguity ariſes, it may be explained by evidence. In this caſe, however, a diſtinction is made between what is called a *latent ambiguity* and that which is not ſo; the *latent ambiguity* is that which does not appear on the face of the inſtrument, where every thing ſeems right and clear, but the meaning being rendered uncertain, by the proof of ſome fact, the law permits the removal of the doubt by the like evidence.

Jones v. Newman, 1 Black. 60, Cheney's caſe, 5 Co. 68 S. P.

And therefore where a teſtatrix deviſed her eſtate to her couſin, John Cluer, there being both father and ſon of that name, parol evidence was admitted that the ſon was the perſon meant; for the heir's objection aroſe from parol evidence, and therefore parol evidence ought to be received to anſwer it. So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*, circumſtances may be given in evidence to prove which manor was intended, for this is not to contradict the record, but to

2 Roll Abr. 676.

ſupport

ſupport it. (z) And for the ſame reaſon, preſumptions of law may be repelled by the ſame teſtimony.

(z) A. deviſed 400l. to his wife, and made her executrix without diſpoſing of the ſurplus, and Lord Chancellor Hardwicke admitted parol evidence to ſhew that the intention of the teſtator was, that his wife ſhould have it, for there was no ambiguity in the will, nor was it to alter the apparent intention of the teſtator; for by law ſhe was entitled to the ſurplus as executrix, therefore the evidence was admitted only to rebut the rule of equity, which, in ſuch caſes, divides the reſidue amongſt the next of kin contrary to the general rule of law, *Lake* v. *Lake*, *Bul. N. P.* 297. But in *Brown* v. *Selwin*, *ib. (Caſ. Temp. Talb.* 240. *S. C.)* the teſtator having expreſsly deviſed the reſidue to his executors, one of whom owed him money on a bond, parol evidence that the teſtator meant to extinguiſh the bond debt, was rejected, becauſe that would have been to have altered the apparent intent, and not ſimply to have rebutted an equity.

In like manner, as the evidence was received in *Lake* v. *Lake*, to rebut a rule of equity ariſing from a preſumption, parol evidence is alſo received to rebut thoſe preſumptions that ariſe by the rules of law: when a man levies of fine, and no deed is made to declare the uſe, the law preſumes that he did it only to ſecure his eſtate, and it enures to his own uſe; but parol evidence has been admitted to rebut this preſumption, and veſt the eſtate in the conuſee; but uſes to third perſons can only be declared by deed. *Altham* v. *Earl of Angleſea*, *Gilb. Caſ.* 16. *Roe* v. *Popham*, *Dougl.* 25. So if a man makes his will, and afterwards marries and has a child, the law *preſuming* that no one would, in ſuch circumſtances, wiſh his will made before marriage to ſtand, conſiders it as revoked, or more correctly ſpeaking (as Lord Kenyon ſaid, in *Lancaſhire* v. *Lancaſhire*) it preſumes a tacit intention, when a man firſt makes his will, that it ſhall not ſtand in ſuch caſes; this preſumption may be rebutted by parol evidence *(Brady dem Norris* v. *Cubit*, *Dougl.* 31.) though it could not been forced by it. *(Doe dem Lancaſhire* v. *Lancaſhire*, 5 *T. Rep.*

teſtimony. But the *ambiguitas patens*, viz. that which ariſes on the face of the deed or will itſelf,

T. Rep. 49.) But where a man, after having made a will, executes deeds, by which he takes a new eſtate, parol evidence cannot be received to ſhew that the teſtator meant his will to continue. *(Goodtitle dem Holford, and others, againſt Otway*, 2 *H. Blac.* 516.)

Thomas dem. Evans v. *Thomas*, 6 *T. Rep.* 671. The teſtator, after ſeveral deviſes, proceeded thus: Item, I give to my four daughters, Margaret, Anne, Mary, and Elizabeth one ſhilling each: item, I give to my three grandchildren of Llanteway, Anne, Elizabeth, and Elina 40l. each; item, I give to my granddaughter, Elinor Evans, of Merthyr Pariſh, 40l.; item, I deviſe to my GRANDDAUGHTER, Mary Thomas, of LLECHLLOYD IN MERTHYR PARISH, the reverſion of the houſe in Water-ſtreet, &c. At the time of his death, the deviſor had a granddaughter named Elinor Evans, who lived in LLECHLLOYD in Merthyr Pariſh, and a great-granddaughter, Mary Thomas, an infant of about the age of two years, the granddaughter of his eldeſt daughter, Margaret, by her ſecond huſband, John Thomas, being the only perſon of that name in the family; but it appeared that ſhe lived at Greencaſtle, in the pariſh of Llangain, ſome miles from Merthyr pariſh, in which latter pariſh, ſhe had never been in her life. At the trial, the plaintiff's counſel propoſed giving parol evidence to ſhew a miſtake in the name of the deviſee, that, when the will was read over to the deviſor by a Mr. Phillips, who drew it, and who is ſince dead, the deviſor ſaid that there was a miſtake in the name of the woman, to whom the houſe was given: that Phillips then ſaid he would rectify it, but the deviſor anſwered there was no occaſion, as the place of abode and the pariſh would be ſufficient. To this evidence the defendant's counſel objected, contending that there was not that *ambiguitas latens* which authoriſed the receiving of parol evidence. But Lawrence, J. received it ſubject to the opinion of the Court, as to its admiſſibility, in caſe the jury ſhould be of opinion, that the name Mary Thomas had by miſtake been inſerted inſtead

itſelf, is (it is ſaid) never helped by averment or parol evidence; for, ſays Lord Bacon, that

Bacon's Elements, 81.

inſtead of Elinor Evans; but the jury being of opinion that there was no ſuch miſtake, they were directed to find for the defendant on the firſt count, which they accordingly did, and conſequently any further conſideration of this point became unneceſſary. The defendant's counſel then offered evidence of the declarations, made by the deviſor at other times previous to the making his will, expreſſive of his regard for his great-granddaughter, and of his intention of giving her the premiſes in queſtion. This evidence was rejected by the learned judge, who thought that nothing dehors the will could be received to ſhew the intention of the deviſor, which could only be collected from the words of the will itſelf, after the removal of any latent ambiguity there might be in the deſcription of perſons or other terms made uſe of in the will; and the jury, under his direction, found for the plaintiff in the ſeveral counts on the demiſes of the heirs at law, on the ground that the deviſe was void for uncertainty, giving the defendant leave to move to enter a nonſuit. A motion was made accordingly, but the rule diſcharged on the ground that the parol evidence which was properly admitted, raiſed the uncertainty, and that that uncertainty could not be removed by declarations made by the teſtator long before the making the will. But Lord Kenyon there ſaid, that had theſe declarations been made at the time of making the will, he ſhould have thought they ought to have been received in evidence.

In *Lord Walpole* againſt the *Earl of Cholmondeley*, 7 *T. Rep.* 138, the teſtator had made a will in 1752, and in 1756, without diſpoſing of his perſonality, and by a codicil, (reciting that by his *laſt will dated in* 1752, he had made no diſpoſition of his perſonality,) diſpoſed thereof, and appointed executors; it was ruled that there was no ſuch latent ambiguity as to let in parol evidence to ſhew that the teſtator intended by the codicil to confirm the will of 1756, and not to republiſh that in 1752: and that will was therefore determined to be a ſubſiſting will at the time of his death.

were in effect to make that paſs without deed, which the law appoints ſhall not paſs but by deed. It is neceſſary for us to attend carefully to this reaſon, to enable us to diſtinguiſh between caſes which will otherwiſe ſeem to claſh with each other: for though it be true that in caſes where nothing would paſs by parol, no evidence can be received to explain an ambiguity on the face of a will, yet I conceive that in other caſes, both ſpecies of ambiguity are open to explanation by parol evidence.

Ballis and Church v. Attorney-General, Bul. N. P. 297. Biſhop of Meath v. Lord Belfield, 1 Wils. 215.

In the caſe of a will where the deviſee's name was totally omitted, parol evidence to ſhew who was meant, was rejected; but where a clerk was preſented to a church, and inſtituted, but a blank left in the biſhop's regiſter for the name of the patron, this omiſſion was permitted to be ſupplied by parol teſtimony, for the preſentation might have been by *parol*, and therefore it was not in effect to make that paſs by parol, which the law requires to be done by writing, as would have been the caſe if the like evidence had been admitted to ſupply the blank left in the will.

2 Black. 1249.

But Courts of Juſtice are in all caſes extremely cautious in admitting parol evidence to ſupply or explain a written inſtrument. It never ought to be ſuffered to explain away or contradict an explicit agreement, for that is in effect to vary it; and, therefore, where there

was

was an agreement for a leaſe of twenty-one years, at 26l. per annum, it was held to be incompetent to the leſſor to prove the leſſee was alſo to pay a ſum of 2l. 12s. 6d. a year to the ground landlord: but collateral matters about which the agreement is ſilent, as that the landlord was to repair, or the like, might be ſupplied by parol evidences. So where an agreement was made between two perſons, in the following words: "I J. M. do hereby agree with J. C. *to ſerve me* three years *to learn the buſineſs of a carpenter*; the firſt year to have 1s. 2d. per day, the ſecond year 1s. 6d. per day, the third year 1s. 10d. per day, as witneſs my hand;" which agreement was ſigned by both parties; it was held to be competent to a pariſh when J. C.'s ſettlement came in queſtion, to prove by parol that, at the time of ſigning the agreement, J. C. agreed to give J. M. three guineas, *that he was not to be, and was not employed in any other work than that of a carpenter*; for this evidence did not contradict the agreement, but was given to aſcertain a fact collateral to it, in order to explain the intention of the parties, the inſtrument being in ſome meaſure equivocal whether he was to be an apprentice or a ſervant.

Preſton v. Merceau, ibid.

Rex v. Inhabitants of Laindon, 8 T.Rep. 379.

Ibid. 384. Per Lawrence, J.

Caſes of *fraud* do not fall within the principle, and therefore parol evidence may be produced to ſhew that an inſtrument was ſtated to the maker of it to be a different thing from what

what it really was; as where a deed is falſely read to a grantor, or a teſtator having made one will, afterwards makes another, the proviſions of which are widely different, parol evidence that the teſtator, at the time of the execution of the ſecond will, enquired whether it was the ſame as the former, and was told it was, was held to be admiſſible, for this did not go to contradict that which was allowed to be a valid inſtrument, but to ſet it aſide altogether, as being obtained by fraud and impoſition.

Doe dem Small v. Allen, 8 T. Rep. 147.

So where the conſideration of a deed is fraudulently expreſſed to be more or leſs, or different from what it is; in caſes of uſury, and the like, it is competent to either party to prove the truth of the caſe, notwithſtanding the deed.

Filmer v. Gott, 7 Bro. Parl. Caſ. 70. Rex v. Scamonden, 8 T. Rep. 474. Vide Bul. N. P. 273.

CHAP.

CHAP. III.

Of Parol Evidence.

HAVING had occaſion in the preceding chapters, to mention in what *caſes* parol evidence was admiſſible; the principal object of our preſent enquiry will be, what *perſons* are not permitted to give evidence, or privileged from examination, when unwilling to be called: to which I ſhall add a few obſervations on the examination of witneſſes.

SECTION I.

Of Perſons incompetent to give Evidence, by reaſon of the imbecility of their underſtanding.

ALL perſons, who are examined as witneſſes, muſt be fully poſſeſſed of their underſtanding, that is, ſuch an underſtanding as enables them to retain in memory the events of which they have been witneſſes, and gives them a knowledge

Bul. N. P. 293.

Co. Lit. 6 b. edge of right and wrong. *Ideots* and *lunatics*, while under the influence of their malady, not poſſeſſing this ſhare of underſtanding, are excluded; as are alſo *children* of ſo early an age, as to be incapable of any ſenſe of truth. As a Gilb. Law Ev. 147. general rule, fourteen is ſaid to be the age at which a child may be a witneſs, for then *all* are ſuppoſed to have attained a competent knowledge of right and wrong; but ſhort of that age, the receipt or rejection of his teſtimony muſt, in every caſe, depend upon the ſenſe of religion, and apparent underſtanding of the child, when examined previous to the oath being adminiſtered to him. (*a*) A perſon, deaf and dumb,

(*a*) In the caſe of the *King againſt Travers*, 2 *Stra.* 700, the priſoner was indicted for a rape on a child of ſix years old, and Lord C. B. Gilbert refuſed to admit the child as a witneſs, wherefore the priſoner was acquitted. He was then indicted for an aſſault, with intent to raviſh, and the indictment coming on to be tried before Raymond, C. J. at the next aſſizes but one, the ſame objection was taken by Comyns and Darnell, ſergeants, that the girl being then but ſeven years of age, could not be a witneſs. The counſel for the proſecution, endeavoured to diſtinguiſh the caſe of a miſdemeanor from that of a capital offence: But Raymond, C. J. held, that there was no difference between offences capital, and leſſer offences, in this reſpect, and that a perſon, who could not be a witneſs in one caſe, could not in the other. He ſaid, that the reaſon why the law prohibits the evidence of a child ſo young was, becauſe the child could not be preſumed to diſtinguiſh between right and wrong: no perſon had ever been admitted under the age of nine years, and very ſeldom under ten. He then mentioned two caſes at the Old Bailey,

dumb, if of ſenſe to have intelligence conveyed to him, may be a witneſs, and give his evidence by ſigns, through the medium of an interpreter. Ruſſon's Caſe, Leach Cro. Caſ. 455.

Bailey, and rejecting the evidence of the child, the defendant was acquitted.

But in *Brazier's* caſe, 12th April, 1779, *(Bul. N.P. 293. Leach Cro. Caſ. 237)* the queſtion was again conſidered by all the judges, and they held, that a child of any age might be examined on an indictment for an aſſault on her with intent to raviſh, if ſhe appeared to be acquainted with the nature and obligation of an oath.

In an ætate probanda, a perſon cannot be a witneſs under 12 years of age. *Bro. Teſt.* 30.

SECTION II.

Of Perſons incompetent, by reaſon of the Infamy of their Characters.

In the next place, the moral character of a witneſs is to be conſidered. When ſtigmatized by a conviction of certain crimes, his evidence is wholly inadmiſſible, and he becomes, what the law calls an *incompetent* witneſs; *(b)* but other

(b) No two words have been more frequently confounded together, and conſequently leſs underſtood, than thoſe of *competent* and *credible*. A witneſs is properly ſaid to be *competent*, whenever he can be at all examined before

other crimes, though much detracting from the character and *credibility* of a man, do not render him ſo totally infamous as to prevent him from being heard in a Court of Juſtice; nevertheleſs, the parol teſtimony of witneſſes upon oath, as to his general character, is received as evidence, to be left to a jury, whether ſuch a man is a perſon on whoſe relation reliance can be placed. The *viva voce* evidence to deſtroy the credit of a witneſs, muſt be that of perſons who have known his *general character*, and who take upon themſelves to ſwear from ſuch knowledge, that they would not believe him upon his oath. This general evidence is all they are allowed to give *againſt* him, for no man can be ſuppoſed prepared to give a hiſtory of all the tranſactions of his life, in anſwer to a charge ſuddenly made upon him in a Court of Juſtice; but the party, whoſe intereſt it is to ſupport his character, may call upon the witneſſes againſt him, to declare the grounds on which

General Character.

Rex v. Taylor, Peake, N. P. 11. Bul. N. P. 296.

before a court of juſtice, and this *competency* is a queſtion of *law* to be determined by the *judge*, previous to his giving evidence in the cauſe. If the law permits him to be examined, his *credibility* forms the moſt important part of the duty of a *jury*, which they muſt decide on, according to the oppoſing or corroborating circumſtances of the caſe. The expreſſion of "credible witneſs" is often uſed in acts of parliament, but this means nothing more than that the magiſtrate ſhall judge as the jury would do of his *credibility*, but leaves the queſtion of his *competency* as before. 1 *Burr.* 417.

their

their opinion of him is founded. Though only *general evidence* can be given as to his *general character*, yet declarations made by him on the ſame ſubject, contrary to what he ſwears at the trial, may be given in evidence to impeach his credit; even after the death of a ſubſcribing witneſs, a confeſſion made by him on his death bed, that the will he atteſted was a forgery, may be given in evidence to rebut the preſumption ariſing from proof of his hand-writing.

Wright dem Clymer v. Littler, 3 Burr. 1244.

It ſhould here be underſtood, that it is the party *againſt* whom a witneſs is called only, that is permitted to attack his character by *general evidence*; for if the ſame privilege were allowed to the party calling him, the conſequence would be, that ſuch party might deſtroy the credit of a witneſs if he ſpoke againſt his wiſhes, and make him a good witneſs if his evidence was favourable, at the ſame time that he had the means of deſtroying his credit in his hands. But if a witneſs proves *facts* in a cauſe which make againſt the party who calls him, that party, as well as the other, may call other witneſſes to contradict him as to thoſe facts; for ſuch facts are evidence in the cauſe, and the other witneſſes are not called directly to diſcredit the firſt, but the impeachment of his credit is incidental, and conſequential only.

Hardwell v. Jarman, Taunton Sp. Aſſ. 1789. Halting's caſe, D. P 11 June, 1789, per Lord C. Thurlow, Vide Bul. N. P. 297.

Ibid.

But to return to thoſe offences, a conviction of which totally excludes the teſtimony of a witneſs, and renders him incompetent.

Conviction of Crimes.

O Treaſon,

Pendock dem Mackinder v. Mackinder, 2 Wils. 188. Vide Com. Dig. Teſtmoigne, A. 2. Co. Lit. 6. b.

Treaſon, felony, (c) and every ſpecies of what is called, in our books, the *crimen falſi*, ſuch as perjury, conſpiracy, barratry, attaint of falſe verdict, &c. prevent a man, when convicted of them, from being examined in a Court of Juſtice. According to the antient notion, every offence which ſubjected a man to the pillory, and for which he was ſentenced to ſtand there, whether followed with that puniſhment or not, was conſidered as rendering him infamous; but the modern practice has with more propriety been to conſider the *offence*, and not the *puniſhment*, as that to which infamy is attached; and it is now held, that unleſs a man is ſentenced to the pillory for a crime partaking of fraud, the mere circumſtance of an infamous puniſhment being inflicted, does not deſtroy his competency; and, therefore, a man being convicted of a treaſonable libel, or ſlanderous words on the Government, and for that ſentenced to the pillory, is not thereby rendered incompetent; and on the other hand if he is convicted of barratry, or other infamous offence, though he is only ſentenced to be fined, ſuch conviction renders him incompetent.

Vide Salk. 689. 690.

Chater v. Hawkins, 3 Lev. 426.

Rex v. Ford, Salk. 690. Vide etiam Pendock dem Mackinder v. Mackinder, 2 Wils. 182.

When a man is convicted of any of the offences before-mentioned, and judgment entered

(c) By Stat. 31 *Geo.* 3, *c.* 35, it is enacted, that no perſon ſhall be an incompetent witneſs by reaſon of a conviction of petty larceny.

up,

up, he is forever afterwards incompetent to give evidence, unleſs the ſtigma is removed, which, in caſe of a conviction of perjury, on the ſtatute of 5 *Eliz.* c. 9, can never be by any means ſhort of a reverſal of the judgment, for the ſtatute has in this caſe made his incompetency a part of the puniſhment; but if a man be convicted of perjury, or any other offence at common law, and the King pardons him in particular, or grants a general pardon to all ſuch convicts, this reſtores him to his credit, and the judgment no longer forms an objection to his teſtimony; but an actual pardon muſt be ſhewn under the great ſeal, the warrant for it under the King's ſign manual not being ſufficient. It has alſo been held, that if in a caſe within clergy, a convict is burnt in the hand and diſcharged, his credit is thereby reſtored, and he becomes a competent witneſs, becauſe the burning in the hand amounts to a ſtatute pardon, which, whether particular or general, always reſtores competency; and in this caſe, if the record is produced whereby clergy is granted, it is ſufficient, without proving that he was actually burnt: ſtill, though *competent*, the conviction in all theſe caſes would much affect his *credit* with a jury.

Rex v. Crofby, Salk. 289.

Vide 1 Ventr. 349.

Gully's caſe, Leach Cr. Caſ. 215.
Rex v. Count de Caſtlemain Sir T. Raym. 380.

Pet Trevor, Ann. Com. Dig. Teſtmoigne, A. 2.

To found this objection to the teſtimony of a witneſs, the party who intends to make it ſhould be prepared with a copy of the judgment

Lee v. Gaſel, Cowp. 3.

Wilkes v. Smallbrooke, 1 Sid. 51.

ment regularly entered upon the verdict of conviction, for, until ſuch judgment is entered, the witneſs is not deprived of his legal privileges; and this was formerly the only mode by which the objection could be raiſed, for it was then conſidered as a rule, that no man could be examined to prove his own infamy; but by the modern deciſions on this ſubject, though a man cannot be aſked any queſtion tending to convict him of a crime, and thereby be put in danger from his own examination, yet he may be aſked whether he is already convicted, and has ſuffered the judgment of the law; for his anſwer to theſe queſtions can put him in no further peril; and the adverſe party, not knowing that he was to be examined as a witneſs, may not be prepared with evidence of the record of the conviction.

Rex v. Edwards, 4 T. Rep. 440.

Vide Gilb. Law Ev. 139. Bul. N. P. 286. and caſes there cited. Dr. Dodd's Caſ. Leach Cro. Caſ. 184.

One who is *particeps criminis* is a competent witneſs for the plaintiff or proſecutor, in every caſe, though left out of the declaration, for the purpoſe of being called as a witneſs. In treſpaſſes, where a ſatisfaction by one is a diſcharge of the others, it may go to his credit; and much more ſo in criminal caſes, where a promiſe of pardon has been given him, but no actual pardon granted. Indeed it has been thought by ſome, that in a criminal caſe a witneſs, who has had a promiſe of pardon, is thereby rendered incompetent on account of the ſtrong bias

the

the promiſe muſt give to his mind, but this is now generally conſidered as affecting his credit only.

Religion.

Under this head of the moral character of witneſſes, may be claſſed the notice which the law takes of their religious principles or prejudices. At the time when a gloomy ſuperſtition had obſcured all liberal ſentiment, we are not to ſuppoſe that our own laws, more than thoſe of ſurrounding nations, (*d*) were favourable to thoſe men whom the auſterity of its profeſſors ſtigmatized as *infidels*. Thoſe, to whom the divine doctrines of the Goſpel were unknown, were deemed incapable of binding themſelves by the ſolemn obligations of an oath, the zeal of our anceſtors not permitting them to believe that the prophane books of another religion could be obligatory on the conſciences of its votaries, or be legally acknowledged in a Chriſtian court of juſtice. Jews were received in

Co. Lit. 6. Hawk. P. C. 434.

(*d*) It has been obſerved by Sir Matthew Hale, that the Spaniards had ſpecial laws touching the form of oaths to infidels: and Lord Mansfield, then Solicitor General, in his argument in the great caſe of Omichund and Barker, alſo mentioned, that in Spain, Moors were, in very early times, permitted to ſwear on the Koran, and cites the form of their oath from Selden. We are not to aſcribe this deviation from the practice at that time common in Chriſtian countries, to any extraordinary liberality in the minds of the Spaniards, but to the divided empire which the Moors held with them, and which would neceſſarily be the cauſe of much indulgence to the latter.

the

Vide Gilb. Law Ev. 145. 2 Hal. P. C. 279.

the common law courts, becauſe they could ſwear on the Old Teſtament, which is part of our belief; but the civil law went ſo far as to exclude even them, and all *heretics*, from examination. I am not aware that it has ever been expreſsly determined that *excommunicated perſons* cannot be received as witneſſes, though

Gilb Law Ev. 146.

dicta are to be found which ſay they cannot: were the queſtion now to ariſe, a contrary deciſion would probably take place, for in modern times much more liberality has been ſhewn in this particular. Sir Matthew Hale, to whom the want of care or zeal in protecting the religion of his country can never be imputed,

2 Hal. P. C. 279.

ſeems to have been of opinion that infidels might, in ſome caſes, be examined, obſerving, "It were a very hard caſe, if a murder committed "here in England, in preſence only of a *Turk* "or a *Jew*, that owns not the Chriſtian reli- "gion, ſhould be diſpuniſhable, becauſe ſuch "an oath ſhould not be taken which the witneſs "held binding, and cannot ſwear otherwiſe; "and poſſibly might think himſelf under no "obligation if ſworn according to the uſual ſtile "of the Courts of England. But then (he "adds) it is agreed that the credit of ſuch a teſ- "timony muſt be left to the jury." (e) Notwithſtanding

(e) How different is this mild and humane language, from the intemperate zeal of Sir Edward Coke, who ſays,

withſtanding this, the general received opinion was, that they could not be witneſſes, till the caſe of *Omichund* and *Barker* came before Lord Hardwicke, when it was ſolemnly decided by him, aſſiſted by the two chief juſtices (Lee and Willes) and the Chief Baron Parker, that the evidence of a Gentoo, ſworn according to the ceremonies of his own religion, was admiſſible; and the general principle eſtabliſhed, that the teſtimony of all Infidels, who are not Atheiſts, was to be received. *(f)* In a late caſe before Mr. Juſtice Buller, he would not ſuffer the particular opinions of a man profeſſing the Chriſtian religion to be examined into; but made the only queſtion, whether he believed the ſanction of an oath, the being of a Deity, and a future ſtate of rewards and puniſhments: but a perſon who has no idea of the Being of a God, or a future ſtate, is not admitted.

Omichund v. Barker, 1 Atk. 21. 1 Wils. 84. S. C. Willes 538 S. C.

Rex v. Taylor, Peake N. P. 11.

Rex v. White, Leach's Cro. Caſ. 482. Dutton v. Colt, 2 Sid. 6.

ſays, "that all *infidels* are in law perpetual enemies; for between them, as with the Devils, whoſe ſubjects they be, and the Chriſtian, there is perpetual hoſtility, and can be no peace." Vide 7 *Co.* 17, *a. Calvin's Caſe.*

(f) So in *Fachina* v. *Sabine*, 2 *Stra.* 1104, it was held at the council in the preſence of the two chief juſtices, that a Mahomedan might be ſworn on the Koran. See alſo *Morgan's Caſe*, *Leach's Cro. Caſ.* 64. By the report of Lord C. J. Willes's judgment, from his own M. S S. lately publiſhed, it ſhould ſeem that he confined his opinion, as to the admiſſibility of Gentoos, to the particular caſe of a contract made in a foreign country, but the ſubſequent deciſions have left no doubt that they are admiſſible in all caſes.

The

The uſual *form* of adminiſtering the oath has frequently been diſpenſed with, as where Doctor Owen, Vice Chancellor of Oxford, being called as a witneſs, refuſed to be ſworn by laying his right hand on the book and kiſſing it, but cauſed the book to be held open before him, and lifted up his right hand; the jury in this caſe prayed the opinion of the Court, if they ought to think this teſtimony as ſtrong as that of a witneſs otherwiſe ſworn; and *Glin, Chief Juſtice*, told them that in his opinion he had taken as ſtrong an oath as any other witneſs; but ſaid, that if he were ſworn himſelf, he would kiſs the book. In like manner, a Scotch covenantor has been permitted to ſwear by holding up his hand; for as Lord Chief Baron Parker obſerved in *Omichund* and *Barker*, "Oaths are to be adminiſtered to all perſons "according to their own opinions, and as it moſt "affects their conſciences." This certainly is the beſt teſt of truth, and the legiſlature on this ground have, by ſeveral acts of Parliament, viz. 7 *and* 8 *W.* 3. *c.* 34, 1 *G.* 1. *ſt.* 2. *c.* 6, 8 G. 1. *c.* 6, *and* 22 *G.* 2 *c.* 30, *ſ.* 46, diſpenſed with any oaths at all from Quakers in civil caſes; but their affirmation is ſtill inadmiſſible in criminal proceedings, to charge or exculpate another, though it may be read to exculpate themſelves. It has been held that an appeal of death, and motions for informations and attachments,

Mildrone's caſe, Leach Cro. Caſ. 469. Mee v. Reed, Peake N. P. 23. 1 Atk. 42. See alſo Cowp. 389.

Rex v. Gardner, 2 Burr. 117.

Caſtle v. Bambridge, 2 Stra. 854.

ments, or to anſwer the matters of an affidavit, are criminal proceedings within theſe ſtatutes; and that conſequently in ſuch caſes, their affirmation is inadmiſſible; but that a motion to quaſh an appointment of overſeers, or a *qui tam* action, are not criminal proceedings, and that in thoſe caſes the affirmation of a Quaker may be received, (g).

Rex. v. Wych, 2 Stra. 832. Rex. v. Bell And. 200. Oliver v. Lawrence, 2 Stra. 946. Rex. v. Turner, 2 Stra. 1219 Atcheſon v. Everett, Cowp. 382.

(g) In this caſe of *Atcheſon* v. *Everett*, *Cowp.* 382, Lord Mansfield gave a very elaborate judgment on the ſtatutes made for the relief of quakers, and on the nature of oaths in general; the extenſive learning of which, is only equalled by the mild ſpirit of toleration inculcated by it.

SECTION III.

Of Perſons incompetent by reaſon of their Intereſt in the Cauſe.

BUT the rule which has the moſt extenſive operation in the excluſion of witneſſes, and which has been found moſt difficult in its application, is that which prevents perſons intereſted in the event of a ſuit (unleſs in a few excepted caſes of evident neceſſity) from being witneſſes in it.—What is ſuch an intereſt, as ſhall totally exclude teſtimony, has often been

Per Lord Mansfield, 1 T. Rep. 300.

the subject of controversy. The old cases have gone upon very subtile grounds: but of late years, the Courts have endeavoured, as far as possible, consistent with authorities, to let the objection go to the credit rather than to the competency of a witness; and the general rule now established is, that no objection can be made to a witness on this ground, unless he be directly interested, that is unless he may be immediately benefited or injured by the event of the suit, or unless the verdict to be obtained by his evidence, or given against it will be evidence for or against him in another action, in which he may afterwards be a party; any smaller degree of interest, as the possibility that he may be liable to an action in a certain event, or that standing in a similar situation with the party, by whom he is called; *the decision in that cause*, may, by possibility, influence the minds of a jury in his own, or the like, though it furnishes a strong argument against his *credibility*, does not destroy his *competency*; thus, in one case, where A, B, and C having, in a joint disposition in chancery, sworn to the same fact, the party injured brought three several actions on the statue of Eliz. for perjury; and in another, where several persons having sworn to the same fact, were severally indicted, it was permitted to one to give evidence on the trial of the others in his favour, for until conviction, he could not be rejected

Vide Bent v. Baker, Appendix.

1 T. R. 183.

Gunstone v. Downs, 2 Roll. Ab. 685. Bath v. Montague, cited Forteseue's Rep. 247.

jected as infamous; and he was not directly interested, in as much as the acquittal of one would be no evidence for the other. So a woman, whose husband was under sentence of death, was held to be a competent witness on an indictment against others for the same offence, though she confessed that she had hopes the conviction of the others might procure a pardon for her husband; for such pardon was not a necessary consequence of the conviction.

Rudd's Cas. Leach Cro. Cas. 151.

Many cases have arisen, and many contradictory decisions are to be found in the books, on the question, how far persons who have been defrauded of securities, or injured by a perjury, or other crime, can be witnesses in prosecutions for those offences, the event of which might *possibly* exonerate them from the obligation they are charged to have entered into, or restore to them money which they have been obliged to pay. But the general principle now established is, that "the question, in a criminal prose- "cution, or penal action, being the same with "that in a civil cause in which the witness is "interested, goes generally to the credit, unless "the judgment in the prosecution, where he "is a witness, can be given in evidence in the "cause wherein he is interested." (*k*)

Vide Burr. 2055. Abrahams v. Bunn, Smith v. Prager, 7 T. Rep. 60. Appendix.

But

(*k*) The cases on this point are so contradictory, that it is impossible to attempt to reconcile them. In *Watt's Case, Hard.* 331, it is laid down as a general rule, that in the case of perjury, he, who is injured by the perjury,

But though this is the general rule, an exception to it ſeems to be eſtabliſhed in the caſe of

ry, cannot be a witneſs on an indictment for it; and in the caſe of *Rex.* v. *Whiting*, 1 *Salk.* 283, it was held, that a woman who had been induced by the fraud of the defendant, to ſign a note of hand, could not be a witneſs againſt him, becauſe his conviction would *influence* the jury on the trial of an action on the note, though *the record could not be given in evidence.* In the caſe of the *King* & *Ellis*, 2 *Stra.* 1104. a defendant in an ejectment, againſt whom the verdict was given, was held not to be a witneſs on an indictment for perjury committed on the trial of ſuch ejectment: and in the caſe of the *King* & *Nunez*, 2 *Stra.* 1043. it was determined, that a perſon who had filed an injunction bill in the Exchequer, to ſtay proceedings in an action brought on a promiſſory note, could not be a witneſs to prove perjury committed in an anſwer to that bill. *Paris's Caſe* (1 *Ventr.* 49, and 1 *Sid.* 431,) is directly contrary to the *King* & *Whiting*; the only difference between the two caſes is, that one information was for fraudulently procuring a warrant of attorney to confeſs judgment, the other for ſo procuring a promiſſory note. And in the *King* & *Moiſe* (1 *Stra.* 595,) which was an indictment for tearing a note, the payee of the note was admitted to prove the caſe. The caſes of the *King* & *Whiting*, the *King* & *Nunez*, and the *King* & *Ellis*, are ſaid by Lord Mansfield, in 4 *Burr.* 2255. to have been over-ruled by Lord Chief Juſtice Lee, in the caſe of the *King* & *Broughton*, 2 *Stra.* 1219; and the rule laid down by Lord Mansfield, in that book, is as above ſtated, "that the queſtion in a criminal proſecution, be-"ing the ſame with a civil cauſe in which the wit-"neſs is intereſted, goes *generally* to the credit; *unleſs* "*the judgment in the proſecution, where he is a witneſs* "*can be given in evidence in the cauſe where he is intereſt-*"*ed.*" A diſtinction, however, may be made between the caſes of the *King* & *Whiting*, &c. and the caſe of the *King* & *Broughton*. In the firſt three caſes, the perſon who was called as a witneſs might eventually have been benefited, becauſe in the *King* & *Whiting*, the note was good

of *forgery*, for many cases have been decided, that a person, whose hand-writing has been forg-

good instrument till the defendant was convicted. In the *King* & *Ellis*, the defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment, if he succeeded in convicting the defendant on the indictment for perjury; and in the *King* & *Nunez*, the suit in the Exchequer was still pending. In the case of the *King* & *Broughton*, the suit in Chancery was ended, and ended in the manner most agreeable to the interest of the witness; for the Lord Chancellor not believing Broughton, the defendant in that indictment, had decreed for the witness, so that the witness could not have even the hope of benefiting himself by convicting Broughton. The following case clearly establishes the position laid down by Lord Mansfield, in the case of *Abrahams* and *Bunn*, but at the same time as clearly overturns the case of *Rex.* v. *Whiting*, and cannot be distinguished from it.—It was the case of *Bartlet* v. *Pickersgill*, and is cited by Lord Mansfield, 4 *Burr.* 2255. as follows: The defendant bought an estate for the plaintiff. There was no writing, nor was any part of the money paid by the plaintiff. The defendant articled in his own name, and refused to convey, and by his answer denied any trust; parol evidence was rejected, and the bill was dismissed. The defendant was afterwards indicted for perjury, tried at *York*, and convicted *on the evidence of the plaintiff*, confirmed by circumstances, and the defendant's declarations. The plaintiff then petitioned for a supplemental bill, in the nature of a bill of review, stating the conviction. But the petition was dismissed, *because the conviction was not evidence.* In the case of *Abrahams* v. *Bunn*, abovementioned, the borrower of money was held a good witness to prove the whole case in an action for usury against the lender, and the authority of this case was fully recognised in the late case of *Smith* and *Prager*; but in an action against the assignee of a bankrupt, for taking usurious interest on a loan to the bankrupt, he not having obtained his certificate, nor paid the money, was not permitted to prove the usury. *Martin* v. *Drayton*, 2 *T. Rep.* 496.

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ed to an inſtrument, whereby, if good, he would be charged with a ſum of money; or one who has paid money in conſequence of ſuch forgery, cannot be a witneſs on the indictment. (*i*)

Watt's Caſ. Hard. 331.

In caſes where the party injured cannot by poſſibility derive any benefit from the verdict in the proſecution, as in indictments for aſſaults, and the like perſonal injury, his competency has never been doubted.

Party in a Cauſe.

From what has been already ſaid, it may be taken as a general rule, that a party in a cauſe cannot be examined as a witneſs, for he is in the higheſt degree intereſted in the event of it; but where a man is not, in point of fact, intereſted, but only a nominal party, as where members of a charitable inſtitution are defendants in their corporate character, there is no objection to an individual member being examined as a witneſs for the corporation, for in this caſe he is giving evidence for the public body only, and not for himſelf as an individual.

Weller v. Governors of Foundling Hoſp. Peake Caſ. 153.

So in queſtions as to the rights, or immunities of a *corporation*, the evidence of individuals who are not privately intereſted, though members of the city, may be received; but where corporators, as ſuch have private intereſts as to be free of toll, rights of common, &c. theſe being really and ſubſtantially intereſted in the event of the cauſe, are no witneſſes. (*k*) But

Caſe of Corporation of London, 1 Ventr. 351. Ld. Howard v. Bell, Hob. 92. Sandy v. Cuſtomhouſe officers, Skin. 174.

(*i*) See the ſeveral caſes on this head, collected in the Digeſt, at the end of this ſection, letter D.

(*k*) For the inſtances in which corporators are admitted

Witneſſes of Neceſſity.

But there are ſome inſtances, where perſons ſubſtantially intereſted, and even parties in a cauſe, are permitted to be examined, from the neceſſity of the caſe, and abſolute impoſſibility of procuring other teſtimony.

In an action, in the ſtatute of Winton, the party robbed is a witneſs. (*l*). And, on the ſame

ted as witneſſes.—See Digeſt at the end of the ſection, letter A.

(*l*) As this is an exception to the general rules of law, the grounds on which the deciſion proceeded, and the extent of it, ought to be accurately underſtood. The only caſe on the ſubject is in 2 *Roll's Abr.* 685, 686, and from that, it has been laid down in general terms, in all ſubſequent books, where the ſubject has been treated of. The caſe is reported in *Rolle* as follows: "In an action againſt a hundred brought by the maſ-"ter, being a carrier, for a robbery committed on his "ſervant in the abſence of the maſter, *quere* whether "the maſter being the plaintiff in the action brought, "may be a witneſs to prove, that he delivered the mon-"ies of which his ſervant ſwears he was robbed, before "his ſervant ſet out on his journey in which he was "robbed, for this might be proved by any other, and "no perſon is to be a witneſs in his own cauſe, but for "neceſſity: *as if he himſelf had been robbed, although "that he was plaintiff, yet he might be a good witneſs to "prove himſelf to have been robbed, and of what ſum or "things, and alſo to prove that he gave notice to the "next vill, and levied hue and cry, for this is of neceſſity "for default of other proof.* But as to proving the "delivery of the money to his ſervant before the rob-"bery, and before he ſet out on his journey, this might "be proved by any other, as well as by him, although "it was objected, that it is not ſafe nor uſual for men "to call witneſſes when they deliver money to carry "on a journey, on account of the danger of diſcovery; "and

ſame principle of neceſſity, it has been holden that perſons, who become intereſted in the *com-*

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"and for this reaſon *per curiam*, againſt my opinion, "it was ruled, that he ſhould be received as a witneſs." *Mic.* 1650, *Bennet* v. *Hundred of Hertford.*

Johnſon v. *Browning*, 6 *Mod.* 216. In an action for malicious proſecution, where nobody was by at the time the ſuppoſed felony was committed but the defendant's wife, *who could not, in this caſe, be a witneſs to prove the felony committed.* Holt, C. J. allowed her oath, which ſhe made at the trial of the indictment, to be given in evidence to prove a felony committed, for otherwiſe one that ſhould be robbed, &c. would be under an intolerable miſchief, for if he proſecuted for ſuch robbery, &c. and the party ſhould, at any rate, be acquitted, the proſecutor would be liable to an action for malicious proſecution, without a poſſibility of making a good defence, though the cauſe of proſecution was ever ſo pregnant.

Theſe are the only caſes, I believe, in the books, where parties to the cauſe have been permitted to give evidence for themſelves, and, in the latter caſe, it ſeems to have been taken for granted, that the wife could not be examined, though her former evidence was admitted.

But it frequently happens that perſons are made defendants with others, for the mere purpoſe of excluding their teſtimony. In this caſe, if no evidence whatever is given againſt the perſon ſo improperly made defendants, he will be entitled to an acquittal immediately the plaintiff has cloſed his caſe, and may then be examined as a witneſs, on behalf of the other defendant (*Gilb. Law Ev.* 134;) and in like manner a defendant in trover, who had ſuffered judgment by default, was permitted by Lord Kenyon, to give evidence to prove his co-defendant (who pleaded) not guilty, *Ward* v. *Haydon & al. Eſp. Caſ.* 552. So in *Rex.* v. *Fletcher*, 1 *Stra.* 633, on an indictment againſt two for an aſſault, one ſubmitted and was fined, and he alſo was admitted as a witneſs for the other. But if there is the ſlighteſt evi-

dence

mon courſe of buſineſs, and who alone can poſſibly have knowledge of a fact, may be called as witneſſes to prove it; as in the caſe of a ſervant, who has paid money, or a porter who, in he way of his buſineſs, delivers out or receives parcels, though the evidence whereby he charges another with the money or goods, exonerates himſelf from his liability to account to his maſter for them, for, if this intereſt was to exclude teſtimony, there would never be any evidence of ſuch facts. (*m*)

Bul. N. P. 289. Spencer v. Goulding, Peake N. P. Caſ. 129.

to charge one defendant, he cannot be a witneſs for the others, becauſe the queſtion, as to his liability, muſt wait the final event of the verdict, and the jury may, of their own knowledge, have further information of the fact, than what they collect from the witneſſes in Court. *Gilb. Law Ev.* 134. Thus where A. and B. being jointly ſued *in aſſumpſit*, B. pleaded his diſcharge under a commiſſion of bankruptcy, and on the trial proved his certificate. Lord Kenyon held, that he was not entitled to an immediate acquittal, but that the plaintiff, having made a caſe againſt him, was entitled to have the whole caſe ſubmitted to the jury at the ſame time, and conſequently he could not be examined as a witneſs for the other defendant. *(Raven & al.* v. *Dunning K. B. Sittings at Guildhall, after Trinity Term, 1799.) & al M. S.*

If the plaintiff, in his declaration, ſtate that the defendant, together with A. B. committed a treſpaſs, this will not deprive the defendant of the teſtimony of A. B. unleſs evidence is given of his having been concerned in the fact, and that proceſs had iſſued againſt him, and endeavours uſed to ſerve him with it. *Lloyd* v. *Williams, Caſ. Temp. Hard.* 129. *Hill* v. *Fleming, ibid.* 264.

(*m*) For other inſtances, in which perſons have been admitted witneſſes from neceſſity, ſee Digeſt of Caſes at the end of this ſection, letter (A) plac. 8. (B) plac. 1, 2, 3, 4, 5, 6, 13.

On

Indifferent Perſons.

Other caſes which, at firſt ſight, ſeem to expoſe a witneſs to this objection on account of intereſt, are taken out of the rule by a counter intereſt in him, as where his intereſt in the event of the cauſe, ſupported by his evidence, is counteracted by an equal or greater intereſt, that it ſhould be decided otherwiſe; for inſtance, if an indictment be preferred againſt a county for not repairing a bridge, and the only queſtion be whether it is in repair or not, men of the county are good witneſſes, becauſe it is equally deſirable to every man that the bridge, for convenience of paſſage, ſhould be repaired when it is neceſſary; as that they ſhould

Caſe of Peterboro' Bridge, cited 1 Vent. 351. Gilb. Law Ev. 129. Rex. v. Inhabitants of Wilts, 6 Mod. 307.

On this principle of neceſſity it has been ſaid, that in informations on the ſtatute 13 *C.* 2, againſt hunting deer, the ſtatutes of conventicles, and the act of navigation, the informer ſhall be a witneſs, though part of the penalty goes to him *(Gilb. Law Ev.* 132.) The only caſe which ſupports that doctrine is, that of *Jennings* v. *Hankey*, (3 *Mod.* 114;) but the many caſes, collected by Mr. *Nolan*, in his note on *Rex* v. *Tilly*, 1 *Stra.* 315, fully eſtabliſh the contrary poſition. In addition to theſe, may be mentioned, the caſe of *Rex* v. *Blackmore*, 1 *Eſp. Caſ.* 95, where a witneſs was rejected on an information (under the ſtatute) for concealing naval ſtores, as being the informer, and being entitled to a moiety of the penalty; though in *Rex* v. *Cole*, *Peake's Caſ.* 218, Lord Kenyon held, a witneſs ſtanding in a ſimilar ſituation was not objectionable, becauſe he had no abſolute right to the penalty veſted in him, as the Court were not bound to inflict a pecuniary penalty. But in caſes of rewards for the apprehenſion of felons, &c. it was reſolved by all the judges, that the perſon, apprehending, being entitled to the reward, did not diſable him from being a witneſs. Vide *Leach's Cro. Caſ.* 353. note.

not

not be put to an unneceſſary charge, ſo that he is perfectly indifferent, being equally concerned in both ſides of the queſtion.

On the ſame principle, the acceptor of a bill of exchange is a competent witneſs in an action againſt the drawer, to prove that he had no effects, and thereby prevent the neceſſity of notice to him; for though by ſupporting the action againſt the drawer, he relieves himſelf from an action at the ſuit of the holder, he, at the ſame time, gives an action againſt himſelf at the ſuit of the drawer, in which the evidence he has given of the want of conſideration will not avail him, but muſt be proved by another witneſs; but when a man is proved to be a partner with another, againſt whom an action is brought, he is no witneſs to prove that the goods were ſold to the other, as his ſervant, and on his ſole credit, becauſe here the action, which he gives againſt himſelf, is countervailed by a greater intereſt in getting rid of a moiety of the coſts of the preſent action, to which he as partner would be liable. (n)

Staples v. Okines, K. B. Sittings after Eaſter Tm. 1795. M. S. Elp. 338. S. C.

Goodacre, v. Breame, Peake N, P. 174.

The evident policy of this rule of law, is to prevent thoſe, who neceſſarily have a ſtrong bias on their minds from being put in a ſituation, where their intereſt may induce them to depart

Title without Intereſt.

(n) For other inſtances in which a witneſs is admitted on account of his indifference, ſee Digeſt, letter B. pl. 5.

from

from the truth; and therefore, as we ſaw in a former inſtance where the intereſt is ſtrictly formal, ariſing from the ſituation in which they are placed, and they cannot be really benefited or injured by the event of the cauſe, it does not apply. Of this nature, is the caſe of a guardian in ſoccage, who may be examined on the behalf of his ward in an action brought by him: ſo a grantee, executor, or deviſee, who is merely a truſtee, and has no beneficial intereſt, may give evidence of the grant to him, or, in ſupport of the will, by proving the ſanity of the teſtator, and his having acted in the truſt, will not render him incompetent. But the caſe of a guardian on record, ſtands on a very different foundation, for he is really intereſted in the event of the ſuit, being liable to the coſts, in caſe the verdict is againſt the infant he protects.

Gilb. Law Ev. 123. Goſs v. Tracy. 1 P. Will 290. Goodtitle dem Forbes v. Welford Dougl. 239 Lowe v. Joliffe 1 Blac. 365.

Hopkins v. Neale, 2 Sca. 1026.

Where a right is claimed by a witneſs, which is ſuppoſed to intereſt him in the event of a cauſe, it ſhould be conſidered, before he is rejected on that account, whether it be a ſtrict legal right, or only one exiſting in his own imagination; for if the latter only is the caſe, it does not ſeem to fall within the rule; thus it has been ſaid that a mere tenant at will may prove livery of ſeizin in his leſſor, for his intereſt being ſo precarious that he cannot maintain an action for the poſſeſſion, he is conſidered by the

Witneſs thinking himſelf intereſted.

Hale ſup Lit. 6 Gilb. Law Ev. 124.

the law as no more than the ſervant or bailiff of the freeholder: This inſtance can hardly now be conſidered as an authority, further than toward the eſtabliſhment of the general principle, that the witneſs ſhould have a real, and not a mere ideal intereſt, before he is rejected; for that which the law formerly conſidered as a tenancy at will, is now in moſt caſes converted into a tenancy from year to year, which being a permanent intereſt, is noticed by the law; and, therefore, ſuch a tenant cannot be examined in ſupport of his landlord's poſſeſſion: And it was long ſince ſaid, that if a landlord had promiſed another perſon a leaſe of his land when recovered, he could not be a witneſs; for this, though not an immediate veſted intereſt, was nevertheleſs a right which might be enforced in a Court of Law in caſe a verdict ſhould be procured on his evidence.

Doe dem Forſter v. Williams. Cowp 621. Per Twiſden, 1 Mod. 21.

In theſe caſes, the witneſs himſelf claimed a right; but where the witneſs thinks himſelf under an honorary engagement to make good a loſs, if it is not repaired by the event of the cauſe, though he knows he is not legally bound to do ſo, it has been held ſufficient to reject his teſtimony.

Fotheringham v. Greenwood 1 Stra. 129.

Another thing to be obſerved in the application of this rule of the law is, that the intereſt muſt exiſt at the time the fact the witneſs is to prove happened, or be thrown upon him afterwards

Intereſt acquired ſince the fact to be proved.

terwards by operation of law, or the act of the party who requires his teſtimony; for if after the event the witneſs becomes intereſted by his own act, without the interference or conſent of the party by whom he is called, ſuch ſubſequent intereſt will not render him incompetent. This exception to the general rule of law, is founded on true principles of juſtice, for otherwiſe it would frequently be in the power of the witneſs, and oftentimes in that of the adverſe party himſelf, to deprive the perſon wanting his teſtimony of the benefit of it. Thus though a perſon who knows the circumſtances of a cauſe, lays a wager as to the event of it, or a proſecutor lays a wager that he convicts a defendant, neither the individual in the one caſe, nor the public in the other, will be deprived of the right which they previouſly had to the teſtimony of the perſon ſo intereſting himſelf.

Vide Bent v. Baker, Appendix.

Barlow v. Vowel, Skin. 626. Rex v. Fox, 1 Stra. 652.

Not only muſt the intereſt exiſt at the time of the tranſaction, but it muſt continue to the time of the trial; and therefore when a witneſs is intereſted by being anſwerable to one of the parties, or will have a demand on that party in caſe the cauſe is unſucceſsful, a releaſe from the party to the witneſs, or from the witneſs to the party, as the caſe may require by taking away his intereſt, reſtores his competency; and in theſe caſes, if the party who wiſhes to call the witneſs, tenders a releaſe to him, and he refuſes to

Intereſt removed.

to accept it, or the witneſs having a claim tenders a releaſe on his part, which is refuſed, he may be examined as a witneſs; for neither the witneſs himſelf, nor the party in the cauſe, can exclude his teſtimony, by an objection on account of his intereſt, when that intereſt has in truth been removed. (*o*)

Goodtitle dem Fowler v. Welford, Dougl. 139. Bent v. Baker, Appendix.

I ſhall

(*o*) In the caſe of *Goodtitle dem Fowler* v. *Welford*, a perſon who was deviſee of a reverſion in copy hold premiſes, was called to ſubſtantiate the will, by proving the ſanity of the teſtator, he had ſurrendered his reverſion to the uſe of the heir at law, but the heir had refuſed to accept it, yet the court held him to be a competent witneſs; and *Mr. Juſtice Aſhburſt* ſaid, "every objection of intereſt proceeds on the preſumption that it may bias the mind of the witneſs; but that preſumption is taken away by proof of his having done all in his power to get rid of his intereſt."

But in *Holáfaſt dem Anſley* v. *Dowſing*, 2 *Stra.* 1253, where an annuity of 20l. per annum was given by will to Elizabeth, the wife of John Hales, for life, to her ſeparate uſe; and alſo a legacy of 10l. each to John Hales and his wife, to which John Hales was a ſubſcribing witneſs; the Court of King's Bench held Hales could not be a witneſs, though the deviſee had tendered the two legacies of 10l. each. The chief Juſtice in delivering the reſolution of the Court, ſaid, "If the tender would be equal to payment of the two money legacies, as it is not, yet the annuity charged upon the eſtate deviſed, would ſtill ſubſiſt: and further he obſerved, that the true time for aſcertaining his *credibility* was the time of atteſtation, and if then intereſted, he could not afterwards be a witneſs."

Lord Mansfield, in delivering the opinion of the Court, in *Windham* v. *Chetwynd*, 1 *Burr.* 417, *&c.* commented much at length on the word *credible* witneſſes, in the Statute of Frauds, on which the deciſion of the Court in the laſt caſe, in ſome meaſure, proceeded;

I ſhall conclude this ſection, by obſerving that a man who is intereſted in the event of a ſuit, is

ed; and obſerved, "that the word was never uſed as ſynonymous to *competent*; but when applied, it preſuppoſes the evidence given. After the competence of a witneſs is allowed, the conſideration of his credibility ariſes, and not before; and the only conſideration in determining his competency, muſt be whether he was competent at the *time of his examination*. His Lordſhip ſaid, that the deciſion of the court in that caſe went rather upon the particular circumſtances of that caſe, than upon the general propoſition, and that as to the annuity, there was no releaſe. There could be no payment or tender without the interpoſition of a Court of Juſtice, becauſe the value depended upon uncertain eſtimation, but no attempt had been there made towards paying or tendering the value of the annuity." It is impoſſible to convey, by any abridgment of the caſe of *Windham* v. *Chetwynd*, the ſubſtance even of the very elaborate and elegant judgment pronounced by Lord Mansfield on that occaſion; and the queſtion here made having been ſettled by legiſlative interference, in conſequence of the deciſion in *Anſley* v. *Dowſing*, it becomes unneceſſary to ſtate the caſe at length.

For by Stat. 25 *G.* 2. *c.* 6. it is enacted,

1. That any beneficial deviſe, legacy, eſtate, intereſt, gift, or appointment, made to any perſon being a witneſs, after 24th June, 1752, to any will or codicil, ſhall be void, and ſuch perſon ſhall be admitted as a witneſs.

2. That any creditor atteſting any will or codicil, made or to be made, by which his debt is charged upon land, ſhall be admitted as a witneſs to the execution of ſuch will or codicil, notwithſtanding ſuch charge.

3. That any perſon who had atteſted any will or codicil then made, to whom any legacy or bequeſt was given, having been paid or releaſed, or upon tender made having refuſed to accept ſuch legacy or bequeſt, ſhall be admitted as a witneſs to the execution of ſuch will or codicil.

4. That any legatee, having atteſted a will or co-

dicil

is objectionable only when he comes to prove a fact conſiſtent with his intereſt; for if the evidence he is to give is contrary to his intereſt, he is the beſt poſſible witneſs that can be called, and no objection can be made to him by the party in the cauſe. In this caſe, however, he may himſelf ſometimes object to be examined, becauſe his evidence may ſubject him to future inconvenience, but of this hereafter.

dicil then made, who ſhall have died in the life-time of the teſtator, or before he ſhall have received or releaſed his legacy, ſhall be deemed a legal witneſs on ſuch will or codicil.

After which there is a proviſo, that the credit of every ſuch witneſs, in any of the caſes before-mentioned, ſhall be ſubject to the conſideration of the court and jury before whom he ſhall be examined, or the Court of Equity in which his teſtimony ſhall be made uſe of, in like manner as the credit of witneſſes in all other caſes ought to be conſidered of, and determined.

DIGEST OF CASES.

(A) *In what Caſes Corporators and others are Witneſſes on public Queſtions.*

THE general rule, as to this, is, I believe, correctly ſtated in the preceding ſection; and it was well obſerved by Scroggs, C. J. 2 *Lev.* 231, that it cannot be a general rule that members of corporations ſhall be admitted, or refuſed to be witneſſes in actions for or againſt the corporation, but every caſe ſhall ſtand upon its own circumſtances; to wit, whether their intereſt be ſo valuable, as it can be preſumed it may occaſion partiality in them, or not; with this preliminary obſervation, I ſhall refer to a few of the ancient caſes, and moſt of the more modern ones.

1. In the caſe of the *Corporation of London* for water-bailage, 1 *Ventr.* 351, an action being brought by the Mayor and Commonalty of London, for tonnage on wine imported by the defendant, freemen of London were offered as witneſſes for the plaintiffs; and on objection being taken to them by the defendant's counſel, becauſe they were parties (the commonalty comprehending all the freemen,) and likewiſe intereſted; Scroggs, Dolben, and Raymond, were of opinion that they were witneſſes; but Jones, J. was of a contrary opinion; and the plaintiff's counſel having other witneſſes, did not examine them. But in another caſe, where the queſtion as to right of the City to toll on coals, came in queſtion, it appearing that the Mayor and Sheriffs had the toll for the Corporation at large, and that no individual citizen was benefited by it, the freemen were held good witneſſes. *Rex* v. *Mayor, &c. of London*, 2 *Lev.* 231. And ſo in the caſe of *King* v. *Carpenter*, 2 *Show.* 47, all the judges except Jones, held them good witneſſes in ſuch caſes.

2. Upon

2. Upon a trial at bar, of an iſſue directed out of Chancery, whether all the manor of S. H. was within the County of Stafford, exception was taken to ſome of the witneſſes, who were called to prove the Manor-houſe within the County of Salop, becauſe they were of that county themſelves; but it was ruled that any perſon of the county, if he is not within the hundred where the manor is, might be a witneſs; for as to the county taxes, every hundred pays its proportion; but as to hundreds, there are particular charges. But it being afterwards proved that there was a general tax in each county for maintenance of the ſuit, no one who was charged thereto, was permitted to be a witneſs. *The County of Salop againſt the County of Stafford*, 1 *Sid.* 192.

3. In treſpaſs, the plaintiff claimed as leſſee of the Corporation of Kingſton, who as Lords of the Manor had approved the land in queſtion, and it was ruled that a freeman could not be a witneſs to prove ſufficiency of common left, becauſe the rent muſt be reſerved to the uſe of the Corporation. *Burton* v. *Hinde*, 5 *T. Rep.* 174.

4. The queſtion being whether the plaintiff was entitled to be elected Common Council-man of Appleby; the defendant attempted to diſquality him, by ſetting up two qualifications which he had not, viz. a burgage tenure, and being an inhabitant; and to prove this, called one an inhabitant, but who had not a burgage tenure. It was objected that he was no witneſs to narrow the right, and confine it to burgage tenants and inhabitants, having one of theſe qualifications himſelf, and therefore ſo far intereſted, as he was nearer the right he ſet up than other perſons. But the Court ſaid, there was a neceſſity of allowing ſuch people in a queſtion of this nature, ſince they muſt beſt know the right; beſides, he was in effect a witneſs againſt himſelf, by ſaying, though I am an inhabitant, yet I have no right to be choſen, becauſe I have not a burgage tenure. *Stevenſon*, v. *Nevinſon*, 1 *Stra.* 583. 2 *Lord Raym.* 1353, *S. C.*

5. Upon information, in nature of *quo warranto*, the queſtion on which the defendant's title turned was, whether the former mayor had a right to name two eli-

ſors

iſors to return a jury, if the town-clerk, who might nominate one, was abſent or refuſed. The ſecond eliſor nominated by the mayor, was called as a witneſs, and it was objected to his competency, that he having acted under ſuch a nomination was liable to an information, and, therefore, could not be examined. The judge allowed the objection; but, on motion for new trial, the Court thought it went only to his credit, and granted a new trial. *Rex* v. *Robbins*, 2 *Stra.* 1069.

6. But in the caſe of the *Company of Carpenters*, &c. v. *Hayward*, *Dougl.* 860, where an action was brought by a corporation on a cuſtom, a ſtranger who had acted in defiance of the cuſtom, was held to be an incompetent witneſs.

7. On the trial of an iſſue taken on the return to a *mandamus* to admit a man to his freedom, as the eldeſt ſon of a freeman, the father was held to be a good witneſs to prove the cuſtom for ſons of freemen to become free. *Rex* v. *Mayor and Burgeſſes of Oakhampton*, 1 *Wils.* 332.

8. *Rex* v. *Phillips and Archer*, *at Camb. per Lee*, *C. J. Bul. N. P.* 289, the queſtion being whether the defendants had a right to be freemen, though it appeared there were commons belonging to the freemen, yet an alderman was permitted to prove them not freemen, *it appearing that none but aldermen were privy to the tranſactions, in making perſons free.*

9. On a preſcription of a right of common, as appurtenant to the Houſe of A. B. who has a ſimilar houſe, is a good witneſs; but if it is claimed, by cuſtom, as appurtenant to all houſes ſimilar to that of A. B. would not be a witneſs, becauſe the record would, in this caſe, be evidence of his right. *Bul. N. P.* 283.

10. By ſtat. 27 *Geo.* 3, *c.* 29, Pariſhioners are made competent witneſſes in proſecutions for penalties given to the pariſh, not exceeding 20*l.*

11. On an appeal againſt a poor rate, becauſe certain perſons are not rated; a pariſhioner, who is liable to be rated, but is not in fact rated, is a competent witneſs to prove the rateability of the perſons omitted. *Rex* v. *Proſſer*, 4 *T. Rep.* 17.

12. So an inhabitant, who is not rated, is a competent witneſs on an appeal between his own pariſh and another, *Rex* v. *Little Lumley*, 6 *T. Rep.* 157.

In ſome caſes, freemen intereſted, as ſuch have been deemed

deemed competent when disfranchiſed, as where the Company of Sadlers brought debt on ſtatute 1 *Jac. c.* 22, againſt a man, to recover a forfeiture for making ſaddles inſufficiently, three of the company being disfranchiſed, and declaring on the *voir dire*, that they had no aſſurance of being reſtored, were admitted as witneſſes (*Sadler's Company* v. *Jones*, 6 *Mod.* 165;) but where a freeman was called, and on an objection to his teſtimony, the corporation produced a judgment in the mayor's court, where upon a *ſcire facias* being awarded, and two *nihils* returned, he was adjudged to be disfranchiſed; the man ſaying that he was not ſummoned, and knew nothing of the disfranchiſement, *Holt, C. J.* would not permit him to be examined. *Brown* v. *Corporation of London*, 11 *Mod.* 225.

(B) *Servants and Agents.*

1. A BANKER's clerk having paid more than was due on a bill, was held a good witneſs in an action brought by the banker to recover back the ſurplus; and this from *neceſſity*. *Martin* v. *Horrel*, 2 *Stra.* 647. So where a perſon generally entruſted his ſon to receive money for him, who did ſo, and delivered it to the defendant; in an action of trover to recover it, the ſon was held a good witneſs. *Anonymous*, *Salk.* 289.

2. The plaintiff's ſervant having given money of his maſter's to the defendant for illegal inſurances in the lottery, was admitted a witneſs for his maſter, *on being releaſed by him*. Note, this was not the caſe of an ordinary tranſaction in buſineſs, and therefore the releaſe appears to have been neceſſary to make him a witneſs, *Clarke* v. *Shee*, *Cowp.* 199.

3. A. ſells goods to B. and afterwards C. deſires D. to pay A. and promiſes to repay him. D. pays A. and afterwards B. allows the money to D. in account. In an action againſt C, B. was called to prove the account (it amounting to payment) and it was objected, that the contract being originally only between A. and B. B. was ſtill liable to A. and was therefore ſwearing to diſcharge himſelf, but the Chief Juſtice ſaid, he would allow him to be a witneſs to prove the payment as a ſervant to C. *Brownſon* v. *Avery*. 1 *Stra.* 506.

4. A factor, who was to have a poundage, *according to*

to the amount of the ſale, was held a good witneſs, to prove the contract in an action by his principal. *Dixon* v. *Cooper*, 3 *Wils.* 40; and in like manner, a factor, who was to have all above a certain ſum, was admitted to prove a contract above that ſum, by Heath and Rooke, J. (diſſent. Eyre, C. J.) for this was ſtill in the ordinary courſe of buſineſs. *Benjamin* v. *Porteus*, 2 *H. Blac.* 590.

5. A. having received money as for the uſe of B. was admitted in an action by B. for the money to prove that he was agent, not on the ground of neceſſity, but becauſe he ſtood indifferent in point of intereſt between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant. *Ilderton* v. *Atkinſon*, 7 *T. Rep.* 480; and on the ſame principle, the Captain of an Indiaman having borrowed money of the plaintiff, was permitted to prove it borrowed for the uſe of the ſhip in an action againſt the owners, on the principle that he was indifferent between the parties, being in all events anſwerable to one or the other. *Evans* v. *Williams*, 7 *T. Rep.* 481, note (*c.*)

6. A. delivered South-Sea Bonds to B. from whom they were ſtolen: when preſented for payment of the intereſt, they were ſtopped by C. (a clerk,) againſt whom D. the holder, brought trover, which the Company defended, on having a bond of indemnity from B. This bond prevented B. from being examined as a witneſs in the action againſt C. *Ball* v. *Boſtock*, 1 *Stra.* 575.

But A. having afterwards brought trover againſt D. B. was held a good witneſs in ſuch action, ibid.

7. In an action brought againſt the maſter for an injury, by the negligence of the ſervant, he is not a witneſs for his maſter until releaſed. Therefore a bailiff, to whom a warrant is directed, cannot be examined for the ſheriff in an action for eſcape. *Powell* v. *Hord*, 1 *Stra.* 650, 2 *Lord Raym.* 1411. Nor a ſervant, whoſe buſineſs it is to take care of the pipes of the New River Company, through a defect of which the plaintiff met with an accident. *Green* v. *New River Company*, 4 *T. Rep.* 589. But if the maſter releaſes the ſervant in ſuch caſe, he is a good witneſs. *Jervis* v. *Hayes*, 2 *Stra.* 1083.

8. So in an action for ſinking a barge, on board of which

which the plaintiff had a cargo of corn, the maſter is a good witneſs when releaſed by the plaintiff. *Spitty* v. *Bowens*, *Peake's N. P. Caſ.* 53.

9. But without ſuch releaſe, he is not: and in like manner, an action on a policy on goods, on board a ſhip, the maſter and owner was held not a competent witneſs to prove the ſhip ſea worthy, without a releaſe by the plaintiff. *Rotheroe*, v. *Elton*, ib. 84. *Fox* v. *Luſhington*, ib. note.

10. So in an action on a policy of inſurance, ſtating a loſs by the barratry of the maſter, he cannot be a witneſs for the underwriters to prove the deviation made with the conſent of the owners, unleſs releaſed by the defendant; for if the plaintiff ſucceeds on his barratry, he is anſwerable to the underwriters. *Thompſon* v. *Bird*, *Eſp. Caſ.* 339.

11. A ſervant for beating whom his maſter has brought treſpaſs, may be a witneſs to prove the beating, *Deal* v. *Harding*, 1 *Stra.* 595, and *Lewis* v. *Fog*. 2 *Stra.* 944. contrary to *Danſley* v. *Weſthouſe*, 1 *Stra.* 414. which is over-ruled; and in like manner, the plaintiff's daughter being ſeduced, is a good witneſs to prove the ſeduction, *Cock* v. *Wortham*, 2 *Stra.* 1054. but ſhe cannot give evidence of a promiſe of marriage, to increaſe the damages.

12. On an information for importing teas from a country in which they were grown contrary to the act of navigation, the defendant called the maſter of the ſhip: but his evidence was rejected, though there had been no information againſt the ſhip, becauſe by the ſtatute it is forfeited, and he would be anſwerable over to the owners. *Fuller* v. *Jackſon*, *Bunb.* 140. In like manner, in an information for importing India ſilks, the maſter of the ſhip was rejected, becauſe he being an abettor, would be liable to a penalty of 500l. *Rickſon* v. *Sandforth*, cited ib.

So in an information for importing brandy in unſizable caſks, the maſter of the ſhip was rejected, being liable to a penalty of 100l. for breaking *Bulk Spong* v. *Faſting*, *Bunb.* 203.

Note, it is obſerved in the report of the caſe of *Fuller* v. *Jackſon*, that this objection never was allowed before; and a caſe is mentioned to have happened at the ſame ſittings, where on the like objection being made

to

to the maſter of a cart (which by ſtat. 6 and 8 *G.* 1. is forfeited) for running goods, it was diſallowed.

13. In actions by informers for ſelling coals without meaſuring by the buſhel, the ſervants are witneſſes for the maſter, notwithſtanding 3. *G.* 2. inflicts a penalty upon them for not doing it; though Eyre, C. J. did on that account, in two or three inſtances, refuſe to receive them. Per *Lee, C. J.* in *E. I. Comp.* v. *Goſling, Bul. N. P.* 289.

(C) *Witneſſes in Caſes of Bankruptcy and Inſolvency.*

In caſes of bankruptcy, it is the obvious intereſt of the creditor to increaſe the diviſible fund of the bankrupt, and the bankrupt himſelf alſo has the ſame intereſt, becauſe he thereby increaſes his own allowance, for this purpoſe; therefore neither are admitted as witneſſes during the continuance of that intereſt; and by the policy of the bankrupt laws, the bankrupt himſelf cannot at any time give evidence to ſupport his own commiſſion.

1. Conforming to theſe principles, it has been held that upon an iſſue out of chancery, to try whether a bankrupt has loſt money by gaming, the creditor of a bankrupt cannot be examined as a witneſs to prove the fact of his having ſo loſt money, for he thereby increaſes the diviſible fund, by depriving him of his allowance. *Shuttleworth* v. *Bravo.* 1 *Stra.* 507.

2. But in an action againſt a man who pleads his diſcharge under an inſolvent act, another creditor, who is no party to the cauſe, may be admitted to prove the defendant not within the deſcription of the act; for he is not immediately intereſted, nor will the record be evidence for him on any future action of his own. *Norcot* v. *Croot*, 1 *Sira.* 650.

3. Neither can a creditor prove the act of bankruptcy, for he is intereſted to ſupport the commiſſion, *Kooper* v. *Chapman, Peake's Caſ.* 80. but if he releaſes his debt to the aſſignees, he may, though the bankrupt himſelf is party to the action in which the commiſſion

is

is disputed. ib. *Ambroſe* v. *Clendon Caſ. Temp. Hard.* 267. So a creditor, who has ſold his chance of recovering a debt, and whoſe intereſt is thereby removed, is a good witneſs to prove the petitioning creditor's debt in an action by the aſſignees. *Granger and another aſſignees*, v. *Furlong*, 2 *Blac.* 1278.

4. The bankrupt himſelf cannot, in any caſe, be permitted to prove his own bankruptcy, the petitioning creditors' debt, or his trading, though he has obtained his certificate, and releaſes his ſurplus and allowance. *Field* v. *Curtis*, 2 *Stra.* 829. *Chapman* v. *Gardner*, 2 *H. Blac.* 279. And if a joint commiſſion iſſues againſt two, one cannot be called to prove an act of bankruptcy committed by the other, *Flower* v. *Herbert*, cited 2 *H. Blac.* 279. But if the aſſignees prove an act to have been committed by the ſuppoſed bankrupt, which is equivocal, he may be called as a witneſs by the other ſide to explain the act, and ſhew that he did not thereby become a bankrupt. *Oxlade* v. *Perchard*, 2 *Eſp. Caſ.* 287.

5. As a bankrupt cannot increaſe his fund while intereſted, it follows that he cannot, in any caſe, be examined for his aſſignees while uncertificated: but after certificate, he may releaſe his allowance and ſurplus to his aſſignees, and thereby be made a competent witneſs to increaſe the fund, for he has then no intereſt in it, *Butler* v. *Cooke*, *Cowp.* 70. So if his allowance has been paid, he is competent, for he is not bound to refund. *Ruſſel* v. *Ruſſel*, *Brown* 269. but where a ſecond commiſſion has iſſued, he cannot be a witneſs to increaſe the fund under it, till he has actually paid 15s. in the pound; for his future effects are not diſcharged by his certificate till that is paid, and therefore he is ſtill intereſted to increaſe his fund, notwithſtanding his certificate and releaſe. *Kennet* v. *Greenwollers*, *Peake's Caſ.* 3.

6. But to decreaſe his eſtate, as by proving in an action againſt A. that he was the debtor, a bankrupt is a good witneſs, though he has not obtained his certificate. *Walker* v. *Walker*, cited *Cowp.* 70.

(D) *Of Witneſſes on Indictments for Forgeries.*

1. THE name of A. being forged to a receipt, he was held an incompetent witneſs to prove the hand-writing on an indictment for the forgery. *Rex* v. *Ruſſel*, *Leach's Cro. Caſ.* 10.

2. So where a perſon having a bill of Exchange in his poſſeſſion, indorſed a receipt in a fictitious name on it, the acceptor was held not to be a competent witneſs to prove the payment, without a releaſe from the indorſee. *Rex* v. *Taylor*, ib. 255.

3. So the perſon whoſe hand-writing was forged to a letter of attorney to receive ſtock, was held incompetent to diſprove his hand-writing. *Rex* v. *Rhodes*, 2 *Stra.* 728. Note, In *Rex* v. *Parr*, *Leach's Cro. Caſ.* 487, it is ſaid, that the ſtock-holder was admitted in that caſe (which was an indictment for perſonating him to receive a dividend) *to prove the amount of the ſtock he had, and the dividend due to him.*

4. So the aſſignee of a certificate to a navy bill, whoſe name is charged to have been forged to a receipt for the money, is not a competent witneſs. *Rex* v. *Thornton*, *ib.* 723.

5. In like manner, on an indictment for forging a ſeaman's will, an executor named in a ſubſequent will, is not a witneſs to prove the firſt a forgery. *Rex* v. *Rhodes*, ib. 29.

6. But where a bank note was forged in the name of one of the caſhiers, he not being perſonally chargeable, was held to be a witneſs to prove the forgery, though he had given ſecurity for the faithful diſcharge of his duty. *Rex* v. *Newland*, *ib.* 350.

7. In like manner, where A. remitted a bill to B. (which was made payable to him) for the purpoſe of paying the debt of A. to a third perſon, and not on his own account, B. never having received the bill, and having no intereſt in it, was deemed a competent witneſs to prove a forgery of his name to an acquaintance on the back. *Rex* v. *Sponſonby*, ib. 374.

8. And where a banker had paid a forged draft, and being afterwards convinced of the forgery, had ſtruck the

the money out of his account with the perſon whoſe name was forged, he was alſo admitted to be a witneſs. *Rex* v. *Uſher*, ib. 57.

9. So where a man was indicted for forging a receipt, and the perſon whoſe name was forged had recovered the money from the priſoner, he was admitted a witneſs per Willes, C. J. *Wills's Caſe*, *Bul. N. P.* 289.

10. Perſons intereſted may in this, as in other caſes, be made witneſſes by a releaſe; as the ſuppoſed obligor on a bond, may be a witneſs when releaſed by the obligee (*Dr. Dodd's Caſe*, *Leach's Cro. Caſ.* 184;) or the acceptor of a bill, when releaſed by the holder (*Taylor's Caſe*, ante pla. 2.) and the like.

(E) *Of perſons who may be anſwerable over, or have themſelves contracted.*

WHERE a perſon has entered into a contract with another, his ability to fulfil which is afterwards diſputed by a third perſon in a court of juſtice, and the conſequence of a recovery by the third perſon, would be an immediate right in the perſon with whom the contract was made to recover againſt the other who contracted with him, it follows that ſuch contractor cannot be examined as a witneſs in his behalf, till releaſed by him. —therefore

1. If a vendor of an eſtate covenant for the title, or warrant the premiſes, he cannot be a witneſs to ſupport the title of the vendee in an action againſt him by a third perſon, for the premiſes, 2 *Roll's Abr.* 685. but a vendor who does not covenant for the title, or enter into any warranty, is a good witneſs: *Buſby* v. *Greenſlate*, 1 *Stra.* 445.

2. In covenant for rent upon a leaſe by A. to B. the defendant pleaded, that C. and D. being ſeized in fee before the demiſe in the indenture demiſed to E, who entered upon defendant's poſſeſſion. The replication admitted the ſeiſin of C. and D. but ſtated that they demiſed

demiſed to plaintiff before they demiſed to E. and C. was held a competent witneſs to prove the point in iſſue, for the verdict could not be given in evidence in any action which might afterwards be brought either by or againſt him. *Bell* v. *Harwood*, 3 *T. Rep.* 308. But if two perſons are contending for the poſſeſſion, *who are to pay rent in different rights*, there the landlord could not be admitted a witneſs to prove the demiſe. Per *Buller*, ib.

3. If A. agree to indemnify B. (a candidate at an election) againſt a moiety of the expenſes, he cannot be a witneſs for C. (an agent of B.) in an action againſt him for expenſes incurred in the election, for he is liable to a moiety of the coſts under his indemnity. *Trelawney* v. *Thomas*, 1 *H. Blac.* 303.

Perſons who are *jointly* liable with the party to the cauſe, cannot be witneſſes to defeat the demand, though not made parties, if they are thereby benefited.

4. Thus a man who was proved to be partner with the defendant, was not permitted to be examined for the purpoſe of proving that he was ſolely liable, and that the defendant was his ſervant, becauſe by that evidence he diſcharged himſelf from the coſts to which he was liable. *Goodacre* v. *Breame*, *Peake's Caſ.* 174.

5. So where ſeveral partners of a ſhip by deed appointed a ſhip's huſband, and he laid out a ſum of money in inſuring the whole ſhip, and brought ſeveral actions againſt each for the whole money, the defendant in one action was held to be incompetent to prove on the trial of the other, that the money was laid out againſt the conſent of the owners. *French* v. *Backhouſe*, *Same* v. *Fulſton*, 5 *Burr.* 2727.

6. So in an action againſt an executor, a co-obligor in a bond to the ordinary under the ſtatute of diſtribution, was held to be competent to prove a tender of the debt, for he was not intereſted in that cauſe, and the *bare poſſibility* of his being liable to an action in a certain event, was no objection to his teſtimony. *Carter* v. *Pearce*, 1 *T. Rep.* 163.

7. No perſon who has made himſelf liable in a ſecondary degree, as bail, the guardian of an infant on record (*Clutterbuck* v. *Lord Huntingtower*, 1 *Stra.* 506) the *prochein amy*, or in ſhort any perſon who has undertaken

dertaken to pay the coſts, (*Hopkins* v. *Neale*, 2 *Stra.* 1026, *Caſ. Temp. Hard.* 202) can be examined as a witneſs for the perſon on whoſe behalf he has made himſelf liable; but in theſe caſes, the court will, on motion permit another perſon to be ſubſtituted for him, in order that he may be a witneſs.

(F) *Of Perſons themſelves liable charging others (vide ante* B,*) or coming to claim property in themſelves.*

PERSONS who are primarily liable, are never permitted to charge others by their evidence until releaſed, unleſs in caſes where they ſtand indifferent; and therefore if a workman has been employed to do work about the houſe of A. and he afterwards brings an action againſt another workman, who contracted to do the whole for a certain ſum, A. cannot prove this caſe till releaſed by the perſon to bringing the action. *New* v. *Chidgey*, *Peake's Caſ.* 98.

2. A perſon who gives a bribe to another at an election of members of parliament, is a competent witneſs to prove the fact in an action on the ſtatute, though he thereby diſcharges himſelf from the penalty. (*Mead* v. *Robinſon*, *Willes* 442.) So the perſon bribed, is, in like manner, a witneſs, *Buſh* v. *Rawlins*, before Foſter J. at Abingdon Sum. aſſizes, 1755, cited *Cowp.* 199.

3. A man who has been arreſted, and ſuffered by the ſheriff to eſcape, is a competent witneſs to prove the eſcape, for he is not diſcharged by a recovery againſt the ſheriff. *Caſs* v. *Cameron*, *Peake's Caſ.* 124. *Rex* v. *Warden of the Fleet*, *Bul. N. P.* 67. So a perſon reſcued, is a witneſs for the ſheriff in an action againſt him for the reſcue. *Wilſon* v. *Gary*, 6 *Mod.* 211.

4. In an action againſt the acceptor of a bill of exchange, brought by the indorſee, the plaintiff offered to call the indorſer to prove that he indorſed the bill to the plaintiff to receive as agent for him, and that he was ſtill beneficially entitled to it, and the Court held him an incompetent witneſs, as coming to prove a right in himſelf, which would be benefited by defeating the plaintiff's action. *Buckland* v. *Tankard*, 5 *T. Rep.* 578.

SECTION

SECTION IV.

Of perſons incompetent by Reaſon of their Relation to the Parties.

In the preceding ſections, our attention was confined to perſons whoſe evidence is excluded on account of imbecility, crime, or intereſt. We are now to conſider thoſe who ſtand in a different ſituation, and are excluded not by reaſon of any diſability, but on account of higher duties, either domeſtic or public, binding them to ſilence.

Huſband and Wife.

It has been before mentioned, that no one can be a witneſs for himſelf; and it follows of courſe that huſband and wife, whoſe intereſts the law has united, are incompetent to give evidence on behalf of each other; or any other perſon whoſe intereſts are the ſame (*p*:) and the law, conſidering the policy of marriage, alſo prevents them from giving evidence againſt each other; for it would be hard that the wife, who could not be a witneſs for her huſband, ſhould be a witneſs againſt him: ſuch a rule

Bul. N. P. 286.

(*p*) Therefore, if two perſons are jointly indicted for an aſſault, the wife of one cannot be admitted as a witneſs for the other. *Rex* v. *Frederick & Tracey*, 2 *Stra.* 1095.

would

would occaſion implacable diviſions and quarrels between them.

The rule extends even to criminal proſecutions, except the caſe of high treaſon, where it has been ſaid, the law deems the allegiance due to the Crown paramount to every private obligation: (though even this has been doubted;) and as we have before ſeen that witneſſes in ſome degree intereſted may be admitted where abſolute neceſſity requires it; ſo where the huſband has committed perſonal violence on the wife, ſhe may, from the neceſſity of the caſe, be examined as a witneſs againſt him; as in the caſe of Lord Audley, who was indicted for aſſiſting in the rape of his wife; and though the propriety of the deciſion was at one time doubted, yet reaſon ſeems ſtrongly to ſupport it; and more modern caſes have adopted the practice, and admitted her evidence againſt her huſband of perſonal violence, or ill-treatment of herſelf.

Vide 1 Brownl. 47 & Keeb. 403 & 1 Hal. P.C. 301. Hawk.P.C.lib. 2. c. 46. ſ. 16.

1 State Tr. 265, 269, Hutton 115 vide Sir T. Raym. & Rex v. Azire, 1 Stra. 633.

It is clearly ſettled, that a woman who is not legally the wife of a man, though ſhe has been in fact married to him, may be a witneſs againſt him; as in an indictment for bigamy; the firſt marriage being proved by other witneſſes, the ſecond wife may be examined to prove the marriage with her, for ſhe is not *de jure* his wife: ſo if a woman be taken away by force and married, on an indictment againſt the huſband *de facto*,

Bul. N. P. 287.

Hawk. ut ſupra.

facto, founded on the ſtatute 3 *Hen.* 7, ſhe is a witneſs to prove the fact, becauſe the contract of marriage being obtained in expreſs violation of that law, has no binding operation. But on an indictment for bigamy, after a marriage in fact has been proved, a former wife is no witneſs to prove her marriage, becauſe ſhe is legally his wife, and therefore incompetent to give evidence againſt him.

1 Hal. P. C. 693.

The rule of law does not merely prevent a huſband or wife from giving evidence for the purpoſe of criminating each other; it goes much further, and precludes any evidence which has the *leaſt tendency* to it, or which directly prejuces the civil rights of either. In a civil action, as well as a criminal proſecution, they are not permitted to give any evidence which in its future effects may criminate each other; and this rule is ſo inviolable, that no conſent of the other party will authoriſe the breach of it. But in civil actions, where neither is a party, the wife may be called as a witneſs to prove facts which may eventually charge the huſband. (*q*)

Rex v. Inhabitants of Cliviger Broughton v. Harper.

Barker v. Dixie. Vide Williams v. Johnſon.

In

(*q*) In action for a malicious proſecution, the defendant was willing that the plaintiff's wife ſhould be examined. *Lord Hardwicke*, "The reaſon why the law will not ſuffer the wife to be a witneſs for or againſt her huſband, is to preſerve the peace of families, and therefore I ſhall never encourage ſuch a conſent;" and ſhe

In like manner as the law reſpects the private peace of men, it conſiders the confidential communications

Profeſſional Confidence.

ſhe was not examined. *Barker* v. *Sir Woolſton Dixie*, *Bart. Caſes Temp. Hard.* 264.

In ejectment the plaintiff made title to his leſſor to the lands in queſtion, as ſon and heir of Jerome Jaques, and Hannah his wife, in right of Hannah. The defendant gave in evidence that Jerome Jaques was married before he was married to Hannah; and the woman to whom it was ſuppoſed he was married before, was produced at the trial, *Sum. Aſſiz.* 13 *W.* 3. at *Maidſtone*, to prove this marriage. The counſel for the plaintiff oppoſed her teſtimony, becauſe ſhe ſwore for her advantage; viz. to have a huſband, the huſband being then living. But nevertheleſs Gould, J. of the King's Bench, then Judge of Aſſize, admitted her teſtimony. But afterwards the ſame title between the ſame parties, was tried before Holt, C. J. at the aſſizes in March, at *Maidſtone*, 1 *Ann*, *Reg.* and he refuſed after debate, to admit the former wife to be a witneſs for this purpoſe: but upon other evidence, the former marriage was proved to the ſatisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the ſame trial before Gould, J. the jury found a verdict for the plaintiff. *Broughton* v. *Harper*, 2 *Lord Raym.* 752.

In an action by a plaintiff, as a feme ſole, for goods ſold, &c. the defendant called the huſband as a witneſs, to prove that ſhe was a married woman; and he was admitted, and the plaintiff was non-ſuited. On a motion to ſet it aſide, the majority of the Court thought that he was not admiſſible on the ground of policy; Buller, J. doubted at firſt upon the ground that the huſband was not intereſted in that caſe, but he afterwards acceded to the opinion of the Court upon the broad ground adopted by them, of the impolicy of permitting huſband and wife to give evidence for or againſt each other. *Bently* v. *Cook*, *cited* 2 *T. Rep.* 265.

In the caſe of the *King* againſt *the Inhabitants of Chiveger*, 2 *T. Rep.* 263: On an appeal againſt an order of removal, the reſpondents proved a marriage in fact be-

munications made for the purpose of defence in a Court of Justice. By permitting a man to entrust

tween the paupers; and the appellants contending that the husband had a former wife living, called him, but he denying the fact, they offered to call her for the purpose of proving it. The Sessions rejected her evidence, and the question coming on before the Court of King's Bench, the Judges of that Court were also of opinion that she was an incompetent witness. *Ashhurst, J.* said, "The ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may *even tend to criminate* each other. The objection is not confined merely to cases where the husband or the wife are directly accused of any crime, but even in collateral cases, if their evidence *tends* that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury, as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view, therefore, I am of opinion, that her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other." *Gross, J.* said, "The general rule as to husband and wife being witnesses, was founded not on interest but on policy; by which it was established, that a wife should not be called to give testimony *in any degree to criminate her husband*; and Lord Hale says, that she shall not be called even *indirectly* to criminate him; and that rule seems to have governed all the decisions from that time to the present. The true and just ground of objection is not that of interest, but is founded on the political inconvenience of causing dissensions in families, between husband and wife, and so it is put by Lord Hale.

In *Davies* v. *Dinwoody*, 4 *T. Rep.* 678, which was an action brought by the trustees, under a marriage settlement,

truſt his cauſe in the hands of a third perſon, it eſtabliſhes a confidence and truſt between the client and the perſon ſo employed. A counſel, ſolicitor, or attorney, cannot conduct the cauſe of his client if he is not fully inſtructed in the circumſtances attending it: but the client could not give the inſtructions with ſafety, if the facts confided to his advocate were to be diſcloſed. Barriſters and attorneys therefore, to whom facts are related profeſſionally, during a cauſe, or in contemplation of it, are neither obliged nor permitted, though they ſhould ſo far forget their duty as to be willing to do ſo, to diſcloſe the facts ſo divulged, during the pendency of that cauſe, or at any future time; and if a foreigner, in communicating with his attorney, has re-

Wilſon v. Raſtal, 4 T. Rep. 753.

Du Barre, v. Livette, Peake's Caſ. 77.

ment, whereby goods were ſecured to the wife, againſt the ſheriff for ſeizing them under an execution againſt the huſband. He was called to prove the identity of them; and objection was made to him on account of intereſt; and on the caſe coming before the Court, the plaintiff's counſel argued that he was not intereſted; but it was anſwered *per Lord Kenyon, C. J.* that independently of the queſtion of intereſt, huſbands and wives are not admitted as witneſſes, either for or againſt each other; from their being ſo nearly connected, they are ſuppoſed to have ſuch a bias upon their minds, that they are not to be permitted to give evidence for or againſt each other.

It is obſerved in the text, that between third perſons, a wife may be admitted to give evidence, which throws the demand upon her huſband. Thus in an action againſt the daughter's huſband for her wedding cloaths, her mother was admitted to give evidence, which ſhewed that they were delivered on the credit of the mother's huſband. *Williams* v. *Johnſon*, 1 *Stra.* 504.

courſe

Duffin v. Smith, ibid. 108. Vide Doe dem Jupp. v. Andrews, Cowp. 846. Bul. N. P. 284, 2 Stra. 1128, contra.

course to an interpreter, he is equally bound to ſecrecy. But where the attorney himſelf is, as it were, a party to the original tranſaction, as if he atteſts the execution of a fraudulent deed, was preſent when his client was ſworn to an anſwer in chancery, or employed as the ſteward or agent (r,) and does not gain his knowledge of it merely

Wilſon v. Raſtal. ut ſupra.

(r) *Wilſon* v. *Raſtal*, 4 *T. Rep.* 753. In an action on the bribery act, W. Handley was called, who depoſed, that previous to the diſſolution of parliament, in the ſpring of 1790, he had received letters from the defendant, which he had given to Mrs. Handley, with directions to deſtroy them; but did not know whether ſhe had done ſo or not. B. Handley was then called, who ſaid he had the letters in queſtion, which he received from Mrs. H. and that W. H. was at that time under proſecution for bribery, and he wiſhed to render him what aſſiſtance he could. That Mrs. H. had deſired him to deſtroy the letters, but that he had kept them, That there was no action now depending againſt W. H. but the two years were not expired. The letters were not, as he knew of, put into his hands with W. H's privity, but he had kept them with his privity or conſent. W. H. had indeed deſired him to deſtroy them, but he had not done ſo, for the ſame reaſon as he had not complied with the like requeſt from Mrs. H. namely, that he had ſoon after the election ſtated, that W. H. acted only under the direction of the defendant in the election buſineſs. He further ſtated that he was not then concerned in carrying on any ſuit for W. H. that he never was attorney in any action of indemnity; that he had been applied to by W. H. to be concerned, but had declined it; giving as a reaſon, that he was under-ſheriff, and a material witneſs in the cauſe. That he had not employed W. H's attorney for him; but *that W. H. had conſulted him in his profeſſion as a confidential perſon, and had applied to him both before and after he had received the letters. He had deſired the witneſs*

to

merely by the *relation of the client*, the rule does not apply, for in these cases, there was no *professional confidence*, and he stands in the same situation as every other person. In like manner where after the compromise, though before the final conclusion of a cause; a party told his attorney, by way of exultation, that he had succeeded in recovering a sum of money to which he was not entitled: it was held that the attorney might prove this fact, because it was not a *confidential* communication for the purpose of enabling him to conduct the cause.

Cobden v. Kenrick, 4 T. Rep. 431.

This rule of professional secrecy extends only to the case of facts stated to a legal practitioner, for the purpose of enabling him to conduct a cause; and therefore a confession to a clergyman or priest, for the purpose of easing the culprit's conscience, the statement of a man to his private friend, or of a patient to his physician, are not within the protection of the law. We should certainly think the friend, or the physician, who *voluntarily* violated the confidence reposed in him, acted dishonourably: but he cannot withhold the fact, if called upon in a Court of Justice.

Sparke's case, cited Peake's Cases, 77. Dutchess of Kingston's case, 11 St. Tr. 243, &c.

to consult with his attorney, which he had done, as well as with W. H. *himself. The letters were communicated to him in consequence of* W. H. *applying to him professionally.* On this case Mr. B. Thompson, who tried the cause, thought that B. H. was confidentially employed by W. H. and that therefore he could not be examined; but the Court afterwards being of a contrary opinion, granted a new trial.

Where

Eſtoppel.

Where a man has by putting his name to an inſtrument given a ſanction to it, he has been held by ſome judges to be precluded or eſtopped from giving any evidence in a court of juſtice which may invalidate it; as in the caſe of party to a will of exchange or promiſſory note, who has been ſaid not to be an admiſſible witneſs to deſtroy it, on the ground, that it would be enabling two perſons to combine together, and by holding out a falſe credit to the world to deceive and impoſe on mankind. On this principle it was held, that an indorſer could not be a witneſs to prove notes uſurious in an action on a bond founded on ſuch notes, though the notes themſelves had been delivered up on the execution of the bond. At one time this ſeems to have been underſtood as a general principle applying to all inſtruments; but in a caſe where an underwriter of a policy of inſurance was called to prove the inſtrument void as againſt another under-writer, and objected to on this ground; the court declared, that it extended only to *negotiable* inſtruments, and he was admitted to give evidence deſtructive of the policy. It had been in former caſes [1] determined, that a man atteſting the execution of a will was not thereby eſtopped from proving the inſanity of the teſtator, though it went much to his credit; and in a late caſe [2] in which that of *Walton* v. *Shelly* came to be re-conſidered, and underwent much

Vide Walton v. Shelly, 1 T. Rep. 296.

Ibid.

Peat v. Baker, Appendix.

1. Wright dem Clymer v. Littler, 3 Burr. 1244. Lowe v. Jolliffe, 1 Blac. 365.

2. Jordaine v. Laſhbrook, 7 T. Rep. 601.

much diſcuſſion, it was ſolemnly decided by the Court of King's Bench, one judge only (Mr. J. Aſhhurſt) diſſenting, that in an action by an indorſee of a bill of exchange againſt the acceptor, the latter might call the payee and indorſer to prove that the bill was void in its creation, as being drawn in London without ſtamp, though dated abroad; and that the caſe of *Walton* v. *Shelly* was not law. So in another caſe, Lord Kenyon held the indorſer of a bill of exchange (he being releaſed by the acceptor) a competent witneſs to prove that he parted with it to the plaintiff on a uſurious conſideration. We are now conſequently to conſider the rule as no longer exiſting.

Rich v. Topping, Peake's Caſ. 224. Eſp. 177, S. C.

It has in ſome caſes been doubted alſo, how far perſons who have paſſed as married to the world, may be admitted to prove they were not ſo, in a queſtion as to the legitimacy of their iſſue, and ſeveral contradictory deciſions have taken place on this point (*f*.) In queſtions of

Cowp. 594.

(*f*) *Rex* v. *Stockland*, *Burr. S. C.* 508. In a ſeſſions caſe, proof was given, that two perſons had cohabited together as man and wife for thirty years, and the ſeſſions refuſed to hear the ſuppoſed huſband examined, to prove that no marriage had in fact taken place between them, and the Court of King's Bench held the deciſion to be right. But in *Rex* v. *St. Peter Burr. Set. Caſ.* 25, *Bul. N. P.* 112. it was held that the ſuppoſed huſband was a competent witneſs to diſprove the marriage.

In *Standen* v. *Standen*, *Peake's Caſ.* 32. Lord Kenyon permitted a man who had been in fact married, to prove that the banns of marriage were not duly publiſhed;

of legitimacy, Lord Mansfield ſaid, that as to the *time of the birth*, the father and mother were the moſt proper witneſſes to prove it; and in the principal caſe, declarations of the deceaſed parents, that a child was born *before* the marriage was admitted; but he added, that it was a rule founded in decency, morality and policy, that they ſhould not be permitted to ſay after marriage that they had had no connection, and therefore the offspring was ſpurious, more eſpecially the mother who was the offending par-

Goodright dem Stevens v. Moſs. Cowp. 591.

ed; and in a ſtill later caſe which came before the Court, the reputed wife was held to be competent to prove ſhe was not married. Thus in *Rex* v. *Inhabitants of Bromley*, 6 *T. Rep.* 330. On the hearing an appeal from an order of removal, the reſpondents produced evidence to ſhew the ſettlement of the pauper's father was at Bromley, and in order to prove his marriage with the mother, produced witneſſes to prove they cohabited together, and were reputed as man and wife. The defendant offered to produce the mother to ſhew that ſhe never was married, or that if ſhe ever was, the ceremony took place in Ireland, under ſuch circumſtances as the appellants contended by the laws of Ireland, rendered it wholly void. This was objected to, and the Court of Quarter Seſſions being of that opinion rejected it, ſubject to the opinion of the Court. *Lord Kenyon* ſaid, this evidence was certainly admiſſible; though the juſtices of ſeſſions were to judge as to the effect of it. His Lordſhip then mentioned *Rex* v. *St. Peter*, and ſaid, there are many other caſes in which it has been decided, that the parents may be called as witneſſes with reſpect to the legitimacy of their iſſue; and if they may be called to prove they are legitimate children, there is no reaſon why they ſhould be conſidered as incompetent, when called to prove that the children are illegitimate; but in all theſe caſes ſuch teſtimony is open to great obſervation.

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ty; that point, his Lordſhip added, was ſolemnly determined at the delegates, but the queſtion of acceſs or non-acceſs, was totally different from giving evidence of the time of the birth; and it was clear, that the declarations of a father or mother could not be given in evidence to baſtardize the iſſue born *after* marriage. (*t*) Ibid. 592.

(*t*) In *Rex* v. *Reading*, *Caſ. Temp. Hard.* 79. On an order of baſtardy, the perſon on whom the baſtard was charged to be got was a married woman, and the court held that ſhe was competent to prove the criminal converſation of the defendant with her, but not the non-acceſs of her huſband.

SECTION V.

Of Perſons who are privileged from giving Evidence.

I OBSERVED before, that no one could be compelled to give evidence which tended to charge himſelf with a crime. It has alſo been held, that this rule of law protects a man's pecuniary intereſts, as well as his perſon, from puniſhment; and that therefore he is not compellable to give any anſwer which may ſubject him to a civil action, or charge himſelf with a debt. (*u*) But a man cannot, by becoming bail, deprive Hawkins v. Perkins, 1 Stra. 406.

(*u*) *Bain* v. *Hargrave*, *K. B. Sit. at Guildhall after Hil.*

deprive a party of his evidence; and therefore, where a ſubſcribing witneſs to a bond afterwards

Hil. Term, 35 *G.* 3. MS. Aſſumpſit for money had and received. The defendant had been clerk to the plaintiff, who was a conſiderable wharfinger, and had received ſeveral ſums of money in that character, which had not been paid over to the plaintiff.

The defendant contended, that he was not liable to pay this money to the plaintiff, having paid it over to one Wright, another clerk of the plaintiff's, who was authoriſed to receive it from him.

To prove this caſe, he called Wright as a witneſs, who ſwore that he knew the ſtate of the defendant's account, and that no money was due from the defendant to the plaintiff. Upon which Erſkine, the plaintiff's counſel, aſked him, whether ſome money was not due from ſome perſon to the plaintiff; and the witneſs demurring to this queſtion, *Lord Kenyon* ſaid, that he would not oblige him to anſwer any queſtion, which might tend to charge himſelf with the debt. A man might come voluntarily, and charge himſelf with a debt, but he could not be *compelled* to charge himſelf civilly, any more than to make himſelf liable to a criminal proſecution.

The jury believing that Wright was authoriſed to receive this money, and that it had been paid to him, were about to find a verdict for the defendant, when the plaintiff choſe to be nonſuited.

Raines v. *Towgood*, *K. B. Sit. at Guildhall, after Mich. Term*, 37 *G.* 3. MS. Debt on Stat. 7 *G.* 2. *c.* 8. againſt ſtock-jobbing. The plaintiff called *Nordon*, the broker who made the contracts, to prove the fact. By the 4th ſect. of the act of Parliament, he is ſubjected to a penalty of 500l. He objected to anſwer any queſtion which might tend to charge himſelf with the penalty. Gibbs, for the plaintiff, contended, that as this was not an indictable offence, but merely ſubjected the party to a pecuniary penalty, he could not refuſe to be examined. *Lord Kenyon* was of opinion, he could

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wards became bail for the obligor, he was compelled to give evidence of the execution.

not compel him to give evidence, which would subject him to a penalty. For want of other evidence, the plaintiff was nonsuited.

SECTION VI.

Of the Examination of Witnesses.

THESE are the several objections to which witnesses are liable; and it was formerly the rule to examine a witness upon the *voir dire*, as to his situation, and if the objection was not taken before he was sworn in chief, it was considered as too late after he had been examined by the party calling him, and cross-examined by the other side; but the modern practice is to swear the witness in chief in the first instance; and if it is discovered that he is in a situation which renders him incompetent, it is then time to take the objection: but the bare circumstance of a witness being discovered to be incompetent after the trial, is not alone sufficient ground for a new trial; however it may, when added to others, weigh with the discretion of the Court.

Vide Abrahams v. Bunn, Appendix.

Per Buller, J. 7 T. Rep. 719.

Turner v. Pearte, 1 T. Rep. 719.

On this examination of a witness, as to his situation, he may be asked any questions concerning

cerning inſtruments he has executed, &c. without producing thoſe inſtruments; for the party againſt whom he is called, not knowing the witneſſes to be produced againſt him, cannot always be prepared with the evidence to prove him incompetent.

Botham v. Swingler, Peake's Caſ. 218. Eſp. 164. S. C.

So if a witneſs on examination confeſſes that he was originally intereſted, he may reſtore his competency by proving that he has been ſince a bankrupt, and received his certificate, or any other fact whereby his intereſt is determined. But had his intereſt been proved by other evidence, his certificate ſhould have been produced; and if a releaſe is given by or to the witneſs, for the expreſs purpoſe of rendering him competent, it ſhould be produced, and the ſubſcribing witneſs called to prove it.

When a witneſs is not liable to any legal objection, he is firſt examined by the counſel for the party on whoſe behalf he comes to give evidence, as to his knowledge of the fact he is to prove. This examination, in caſes of any intricacy, is a duty of no ſmall importance in the counſel; for as on the one hand the law will not permit him to put what are called leading queſtions, viz. to form them in ſuch a way as would inſtruct the witneſs in the anſwers he is to give; ſo on the other, he ſhould be careful that he makes himſelf ſufficiently underſtood by the witneſs, who may otherwiſe omit ſome material

terial circumſtance of the caſe. The counſel retained on the other ſide, next croſs-examines the witneſs; and the witneſs not being ſuppoſed ſo friendly to his client as to the party by whom he is called, he is not reſtrained to any particular mode of examination, but may put what queſtions he pleaſes. Indeed of late years, the rule has been ſomewhat relaxed in the caſe of an original examination, and where it evidently appeared that a witneſs was hoſtile to the party by whom he was called, and unwilling to anſwer queſtions put to him; the examination in chief has been permitted to aſſume the appearance of a croſs-examination, and leading queſtions to be put to a witneſs. It is impoſſible to point out the caſes in which the general rule of law ſhall be ſo departed from; and therefore it muſt be left wholly to the diſcretion of the judge, who in general is guided by the demeanor of the witneſs, and the ſituation he ſtands in with relation to the parties.

The party examined muſt, as was before obſerved, depoſe to thoſe facts only of which he has an immediate knowledge and recollection. He may refreſh his memory with a copy taken by himſelf from a day-book; and if he can then ſpeak poſitively as to his recollection, it is ſufficient, but if he has no recollection, further than finding the entry in his book, the book itſelf muſt be produced. Where the defendant had ſigned

Ante 8.

Tanner v. Taylor, cited 1 T. Rep. 467.

Jacob v. Lindſay, Eaſt 754.

ed acknowledgments of having received money in a day-book of the plaintiff, and the plaintiff's clerk afterwards read over the items to him, and he acknowledged they were all right, it was held that the witneſs might refreſh his memory by referring to the book, although there was no ſtamp to the items on which the receipt was written; for this was only proving a verbal acknowledgment, and not a written receipt.

Though witneſſes can in general ſpeak only as to *facts*, yet in queſtions of ſcience, perſons verſed in the ſubject, may deliver their *opinions* upon oath, on the caſe proved by the other witneſſes. Thus a phyſician who has not ſeen the particular patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effects of a particular diſeaſe, and its probable conſequences in the particular caſe; for, though not a particular fact, it is ſtill general information, which the reſt of mankind ſtand in need of, to enable them to form an accurate judgment on the ſubject in diſpute.

APPENDIX.

No. 1.

CASE AS TO THE ADMISSIBILITY OF DEPOSITIONS, &c. AND HEARSAY EVIDENCE.

*The King againſt the Inhabitants of Eriſwell, 3 Term Rep. 707.**

In this caſe the pauper had, in 1779, been examined upon oath before two juſtices, as to the place of his ſettlement; and ſuch examination reduced into writing and ſigned by the pauper. He continued five years afterwards working in the ſame pariſh, and then became inſane, in which ſtate he continued until the time of his removal, which was made by two other magiſtrates upon the old examination. The Seſſions, on an appeal againſt the order, admitted this examination as evidence of the ſettlement, and ſtated a caſe for the opinion of the Court, as to its admiſſibility. The Court being divided, the judges delivered their opinions as follow:

Grose, J. "The objection to this evidence is, that an agreement muſt be proved either by the parties or the witneſſes to it, and that the oath either of the party or the witneſs, is not admiſſible in evidence when it is given in the abſence of another who is to be affected by it. To this it is anſwered, firſt, that this examination

* As to the particular point of this caſe, it is now ſettled by the caſes of The King againſt Nuncham Courtney, ante 41, and the King againſt the Inhabitants of Ferry-fry-Stone, Mic. 42 G. 3, K. B. in the latter of which caſes the Court expreſsly alluded to this caſe of Rex v. Eriſwell, and ſaid that the evidence offered in this caſe was not admiſſible. The caſe is nevertheleſs valuable for the general principles diſcuſſed in it. T. P.

may

may be read, becauſe it is like a judgment upon which no execution has iſſued. My anſwer is, that it is not like ſuch a judgment; for in the firſt place, before ſuch a judgment can be obtained, the party to be affected by it, muſt have had an opportunity of being heard; he muſt have been ſerved with a writ, or have had notice of the proceedings. And ſecondly, the judgment muſt have been given by a court of competent juriſdiction; but, in the preſent caſe, I conceive that theſe juſtices had not juriſdiction to adminiſter an oath. By the 13 & 14 *Car.* 2. they are empowered only to remove; and unleſs they adminiſter the oath for the purpoſe of removing, I think it is no more than if a juſtice of another county adminiſtered it. Here there was no removal, and I do not ſee what power they had to adminiſter the oath but for that purpoſe. Secondly, however, it is ſaid that this examination is competent, becauſe it is as good evidence as that of a perſon who had heard the pauper ſay that he had been hired for a year and ſerved it; that ſuch evidence would have been competent, and therefore that this is ſo. As to its being as good evidence as that of a perſon who had heard the pauper ſay he had been hired; there is this material difference, that had the perſon been preſent, ſuch perſon might have been croſs-examined as to all that paſſed between him and the pauper, if any part of it were to be heard. But here we read only what the overſeers choſe to examine to, and what the magiſtrates thought fit to ſtate. Next, is ſuch evidence competent? it is what is commonly called *hearſay evidence* of a fact. Now it is a general rule that ſuch evidence is not admiſſible, except in ſome few particular caſes where the exception (for ought we know) is as ancient as the rule. A pedigree may be proved by reputation; preſcriptive rights may be ſo proved; and yet in caſes of preſcription, thoſe very perſons, who are permitted to give evidence of what they may have heard from dead perſons reſpecting the reputation of the right, are not permitted to ſtate facts of the exerciſe of the right which the deceaſed perſons ſaid they had ſeen. And I am not aware of any principle upon which this evidence is admiſſible, that may not extend to proving by hearſay any agreement whatſoever. No *principle* was ſtated to take this out of the general rule, to ſhew why hearſay evidence

Hearſay

of

of the agreement ſhould be permitted in this caſe, any more than in any other. But caſes have been cited both to prove that this evidence was admiſſible as hearſay evidence, and as given upon oath before the magiſtrates. In *R.* v. *Nuttley*, (*a*) two queſtions were made, 1ſt. Whether a ſettlement were proved in *Bentworth*; and 2dly, Whether a ſubſequent ſettlement were gained in *Ilsfield*. The ſubſequent ſettlement was attempted to be proved by *Rachael Merratt's* hearſay evidence; The Court were of opinion that a good ſettlement was eſtabliſhed in *Bentworth*; and *Aſton*, J. thought the Seſſions wrong for rejecting the evidence of *R. Merratt*, for "the widows account of her family ought to have been received." The objection therefore was not well conſidered, and for this reaſon, that, if it were evidence, it did not prove a ſettlement in *Ilsfield*. In *R.* v. *Coln St. Aldwyn's* (*b*) the Court did not declare under what circumſtances an examination upon oath would be evidence, but determined that in that caſe it ought not to have been admitted at all: and the ground upon which Lord C. J. *Lee* proceeded, was, that the examination was taken by juſtices of another county, and that the perſon was then alive for ought that appeared to the contrary. The objection that the two juſtices were of another county, was immaterial, if the facts being proved on oath behind the back of the adverſe party could be evidence, unleſs the Court thought the examination muſt be authoriſed by the ſtatute; and if it muſt, then the objection applies here that the examination is not within it, becauſe the juſtices who took the examination did not remove, and poſſibly they did not think the evidence ſufficient to warrant them in making the removal. In *R.* v. *Greenwich*, (*c*) the Court did not determine whether or not the hearſay evidence was competent: the objection does not appear to have been taken; but the Court ſaid that the Seſſions had ſtated evidence and not facts, and the caſe was ſent down to be re-ſtated. Undoubtedly however an idea has prevailed, that ſuch hearſay evidence is ſufficient: but I can make no difference between evidence neceſſary to prove an hiring, that is, an agreement to hire, and any other

(*a*) *Burr. S. C.* 701.
(*b*) *Burr. S. C.* 136.
(*c*) *Burr. S. C.* 243.

agreement; the law of evidence muſt be the ſame at the quarter ſeſſions, as in the Courts of *Weſtminſter Hall*; and no one ever conceived that an agreement could be proved by a witneſs ſwearing that he heard another ſay that ſuch an agreement was made. Is the evidence better upon the ground that it was upon oath adminiſtered by two juſtices? evidence, though upon oath, to affect an abſent perſon is incompetent, becauſe he cannot croſs-examine; as nothing can be more unjuſt than that a perſon ſhould be bound by evidence which he is not permitted to hear. Before the ſtatute of *Philip & Mary (d,)* a depoſition taken before the juſtice of the county where the murder was committed was not evidence, even though the party died, or was unable to travel. Why? becauſe, although the juſtice had juriſdiction to enquire into the fact, the common law did not permit a perſon accuſed to be affected by an examination taken in his abſence, becauſe he could not croſs-examine; and therefore that ſtatute was made. To this point the clauſe in the Mutiny Act *(e,)* referred to in the argument, is ſtrong. It is extremely clear, that if in an action by the executor of the pauper it were neceſſary to prove this agreement, the affidavit of a witneſs who was dead, taken before a judge who was to try the cauſe would be incompetent to be read after his death. When then, and upon what principle could this man's depoſition on oath become evidence after his death? No ſuch rule of evidence could exiſt before the 13 & 14 *Car.* 2. Suppoſe the caſe had exiſted the next year, and the year after the pauper had gone before two juſtices and made the oath he did, and after that upon his death two other juſtices had removed his family upon that examination, could this court have determined that hearſay evidence of the hiring was good, or that an oath taken before two magiſtrates (not for the purpoſe of removal, in the abſence of the other party) would have been good? Or ſuppoſe the act of parliament had paſſed two years ago, ſhould we now ſay it is good? I conceive not; becauſe it would be againſt the known law of evidence; for, as hearſay evidence, it is hearſay evidence of a fact; and

Depoſitions.

(d) 1 & 2 *P. & M. c.* 13. and 2 & 3 *P. & M. c.* 10.

(e) Which expreſsly authoriſes the magiſtrates to take the examinations of perſons inliſting.

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as an examination upon oath, and not in the preſence of the oppoſite party, nor taken with an intent to remove, it is extra-judicial. If at that time it were not admiſſible, when did it become ſo? Will the practice of the juſtices at their private meetings, or at the Quarter Seſſions, make it ſo? Surely it is too much to ſay that ſuch practice ſhall alter the law of evidence, prevailing throughout the kingdom, in the courts above and at the aſſizes; as judges of *niſi prius*, we do not affect to alter or make new law; how then ſhall it be competent to juſtices of the peace to do ſo. But even were we diſpoſed to conform to a rule of evidence adopted by ſome juſtices of the peace, what are we to ſay in caſes where one Court of Quarter Seſſions differs from another in their rule? So it is in this caſe; in ſome counties they admit this evidence, in others they reject it. We muſt ſay that ſuch precedents ought not to guide us, but we muſt be governed by the known rules of evidence which are to be found in our law books. If then the deciſions of the courts below cannot alter the law, when has it grown into law by the deciſion of the courts above? I have commented on the deciſions, which were cited in the argument, (the earlieſt of them being in 1739,) and in no one of them has the queſtion fairly and fully come before the court, or been decided as a principal queſtion. Upon what principle ſhall it now be decided? None is laid down. But it may be ſaid that it is in this caſe wiſe and diſcreet to depart from the general rule of evidence, and in this inſtance to admit hearſay evidence of a fact, or evidence on oath adminiſtered in the abſence of the adverſe party. I dread that rules of evidence ſhall ever depend upon the diſcretion of judges; I wiſh to find the rule laid down, and to abide by it. In this caſe I find the general rule; I find no decided authority that forms an exception to it; and nothing but a clear uncontrovertible deciſion upon the point, and not the conceſſion of counſel, or the *obiter dictum* of a judge, ought to form an exception to a general rule of law framed in wiſdom by our anceſtors, and adopted in every caſe except where the exception is as ancient as the rule. Upon theſe grounds it ſeems to me, that upon the evidence ſtated, the juſtices below ought not to have removed the pauper, nor the Court of Quarter Seſſions to have affirmed the order;

der; and consequently that both the orders should be quashed."

Buller, J. "This case has been argued on two grounds; 1st, that it is admissible, as an examination taken on oath by justices who had a competent authority; 2dly, that it is evidence, as a declaration under the hand of the pauper. I am of opinion that it is admissible evidence in each of those lights. But before I state the grounds on which I hold it admissible, it will be proper to premise that I consider the pauper as dead; he being in such a state as renders it impossible to examine him: and, if he were dead, it is admitted at the bar that there are several cases in which it has been held that what he said might be received in evidence. Of those cases I shall take more particular notice when I come to the second part of the case. But the first thing to be considered is, whether this evidence be admissible as an *examination taken on oath by persons having a competent authority?* It seemed to be agreed by those who argued at the bar, that if the justices had made an order of removal immediately on taking the examination of the pauper, the examination would then have been a judicial act, and would have been evidence; indeed the second section of the act calls it a *judgment*. I agree that if the taking of the examination were not a judicial act, but was merely *coram non judice*, it is not evidence as an examination *on oath*. The question then is, whether this were a judicial act or not? It must be so at the time it was taken, or cannot become so at all; and if an immediate removal might have been founded on it, in my judgment it is a full proof that this was a *judicial* act. The power of the justices is founded on the 13 & 14 *Car.* 2, *c.* 12, *s.* 1, which enacts that it shall be lawful, upon complaint made by the overseers of any parish, for any two justices by their warrant to remove and convey any person likely to become chargeable to such parish where he was last legally settled, unless he give sufficient security for the discharge of the parish to be allowed by the said justices. The statute does not in words say any thing about the mode of examination; but wherever a power of judging and determining is given, an authority to examine on oath is virtually and necessarily included in it. Whatever the justices do in pursuance of that statute, I conceive is judicially done; and unless

unleſs the rule be general, this abſurdity would follow; if the juſtices are of opinion on the examination that the pauper ought to be removed, and do remove him, it is evidence; but if they are of opinion that the ſettlement is in the pariſh requiring the examination, and therefore he ought not to be removed, then it is not evidence; whereas in the latter caſe the reaſons are much ſtronger why the examination ſhould be evidence than in the former; becauſe the pariſh officers are preſent at the examination, and are parties to it, being the complainants and the perſons cauſing the examination to be taken. But it never can depend on the judgment which the juſtices ſhall form for or againſt the pariſh, whether the examinations in the caſe are or are not evidence; it muſt be reciprocal. And this examination in my judgment is very ſimilar to the caſe of a depoſition before a coroner, which has been long ſettled to be good evidence, 1 *Lev.* 180. *Kel.* 55, though the perſon accuſed be not preſent when it is taken, nor ever heard of it till the moment it is produced againſt him. The coroner is to inquire into the cauſe and circumſtances of the death of the deceaſed: The juſtices are to inquire to what pariſh the pauper belongs: Both inquiries are general, and no particular perſons are parties to them. Again, where depoſitions are taken before Commiſſioners of Exciſe, if the witneſs die, Lord *Holt* was of opinion that they were good evidence. *Salk.* 555. Where an act is judicially done, it is not neceſſary that the perſon to be affected by it ſhould be preſent in order to make it evidence againſt him, and therefore depoſitions taken by a juſtice of a perſon who afterwards died, though taken in the abſence of the priſoner, muſt be read. So it was determined by all the judges in *Radburn's* caſe, *Mich.* 1787.* It is the ſame as

Depoſitions.

* In the report of Radburn's caſe, Leach Cro. Caſ. 512. It is expreſsly ſtated that the depoſition was taken in the preſence of the priſoner, and afterwards read over to her in the preſence of the deponent, and the ſtatement of the evidence of Mr. Croſts, the magiſtrate, in the ſeſſions papers of 1787, (p. 763,) is agreeable to this report. I have been favoured with a ſight of a MS. copy of the caſe ſtated by Mr. J. Wilſon, which is ſilent as to the fact whether the depoſition was taken in

as to depoſitions taken under a commiſſion from the Court of Exchequer. *Tooker* v. *The Duke of Beaufort*, 1 *Burr.* 146. But an argument was drawn from the mutiny act, which it was ſaid *made the depoſitions evidence* in the caſe of ſoldiers; and therefore it was inferred from thence that the depoſitions were not evidence in any other caſe. I think that act affords a very different inference. The firſt act, which contains any clauſe for examining ſoldiers reſpecting their ſettlements, is 16 *Geo.* 2, which enacts that it ſhall be lawful for two or more juſtices of the county or place where any ſoldier ſhall be quartered, in caſe ſuch ſoldier has either a wife or child, to cauſe him to be ſummoned to make oath of the place of his laſt legal ſettlement; and ſuch ſoldier is thereby directed to obey ſuch ſummons, and to make oath accordingly; and ſuch juſtices are required to give an atteſted copy of ſuch affidavit to the perſon making the ſame to be by him delivered to his commanding officer, in order to be produced when required. Provided, that in caſe any ſoldier ſhall be again ſummoned to make oath as aforeſaid, then on ſuch atteſted copy of the oath by him formerly taken being produced, ſuch ſoldier ſhall not be obliged to take any other or further oath with regard to his legal ſettlement, but ſhall leave a copy of ſuch atteſted copy of examination, if required. That act ſays nothing about the examination, or the copy of it, being evidence, but moſt probably the legiſlature meant or underſtood that they would both be ſo; for the object was to prevent the ſoldier being called upon to attend the juſtices more than once, and at the ſame time to ſubſtitute as

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in the preſence or the abſence of the priſoner, nor does it appear that the point, whether a depoſition taken in the abſence of the priſoner was evidence or not, at all ſubmitted to the conſideration of the judges, the principal doubt of Mr J Wilſon appearing to be, 1ſt, Whether ſuch depoſitions were evidence in a caſe of petty treaſon; and ſecondly, ſuppoſing they were not, whether the party in that caſe was in ſuch imminent danger of death as to make her declarations evidence. In Woodſtock's caſe, Leach. 563, and that of Dingler, ib. 638, the magiſtrate had taken the depoſitions of the perſon wounded, when the priſoner was not preſent, and on that account they were rejected as depoſitions, though in the firſt of thoſe caſes it was received as the dying declaration of the party.

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good a thing as an examination in lieu of it for the benefit of the parish. But in the 32 *Geo.* 2, or between that time and the 20 *Geo.* 2, the Legislature had under their consideration what would be evidence, and accordingly they inserted in the above clause the following words: "which attested copy shall at any time be admitted in "evidence, as to such last legal settlement, before any "of his majesty's justices of the peace, or at any General or Quarter Sessions of the Peace." So the law stands now; and the *copy* only, and not the *original*, is by the act made evidence; which could only be done on the idea that the *original* was evidence before. If it had been necessary to have enacted that the original should be evidence, two words would have done it: and it is impossible to suppose that the Legislature meant that the copy should be evidence when the original was not. This law therefore affords a strong argument that the examination is admissible evidence. Again what was said by Lord Chief J. *Lee* (*g*) in the case of the *King* v. *Coln St. Aldwin's* is a very material authority to prove that this examination was admissible in evidence. There an order of removal of a bastard made in *Wilts* was founded on the examination of the mother in *Middlesex*: *Lee* C. J. there said, "the only mate-"rial evidence which appears to have been given was "the examination of the mother, which ought not to "have been admitted; for it is a general rule in evi-"dence that the *deposition of a living witness* ought not "to be received, *unless it appear that the witness him-"self could not be produced to be examined ore tenus*; "and therefore as the evidence here given has an origi-"nal defect, which cannot be supplied, this order ought "to be quashed." It clearly therefore must have been his opinion that had the mother been dead, or in a state, like this pauper, of incapacity to be examined *ore tenus*, her deposition might have been received in evidence.

"The second ground on which this has been argued to be evidence, is that it is a declaration under the hand of the pauper. This introduces the general question, whether *hearsay evidence* from the person under whom the settlement is claimed can be received. This ques-

(*g*) Mr. Justice *Buller* said he read this from a MSS. note of Mr. Justice *Clive's*.

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tion has been ſo often decided, that in my opinion it would be ſufficient to mention the caſes only; but as different opinions are entertained on the bench upon the ſubject, I ſhall go ſomewhat more at large into the conſideration of it. The weight of the authorities was ſo forcibly felt at the bar, that the counſel, inſtead of denying that in any caſe hearſay evidence could be received, endeavoured to diſtinguiſh the caſes determined from the preſent, and ſuppoſed that they were decided on particular circumſtances. Firſt, it is ſaid that there is no caſe in which hearſay evidence has been allowed where the party is alive and able to be produced. I agree to that poſition; but here the party is *qua dead*, and not able to be produced. Secondly, that in the caſe of *Nutley*, the huſband was dead, and there was alſo perſonal knowledge of the wife that her huſband had been in the ſervice he ſpoke of. And that in the caſe of *Greenwich* the huſband was dead, and it does not appear but other evidence might have been produced when the caſe went down to the ſeſſions again. But let us ſee what thoſe caſes were. In the former, (*h*) the widow depoſed that her late huſband *told* her he had hired himſelf to *Smith*, and that in conſequence of the hiring he went into *Smith's* ſervice, and was turned away a month before the year was up becauſe he ſhould not gain a ſettlement, though *Smith* did not aſſign that or any other reaſon; and the wife further depoſed that ſhe twice ſaw her huſband during the year he ſerved *Smith*. The ſeſſions, conſidering the declarations of the huſband as mere hearſay, rejected them as not being admiſſible evidence. It was argued that the caſe ought to be ſent back to the ſeſſions to hear and receive the declarations of the huſband; that ſuch evidence ought to be admitted in a caſe circumſtanced as the preſent: and that in fact it was the conſtant practice of other ſeſſions to receive ſuch hearſay. On the other hand it was admitted that the evidence of the woman reſpecting the declarations of the huſband was admiſſible. And Lord *Mansfield* ſaid, that he was ſatisfied that a clear hiring was proved; and that *though the evidence rejected ought to have been received*, yet it would only produce more litigation and expenſe, and muſt

(*h*) *K.* v. *Nutley*, *Bolt.* 234. *Burr. S. C.* 701. S. C.

have

have the ſame effect; he ſaid he thought the order ought to be quaſhed. Mr. Juſtice *Aſton* was clearly of the ſame opinion; and ſaid, "to be ſure the evidence of the woman ought to have been admitted; but ſtanding alone *ought* to be taken as *inconcluſive* (which latter expreſſion Mr. Juſtice *Buller* remarked muſt be inaccurately taken; it ſhould have been ought *not* to be taken as *concluſive*.") The other caſe of the *King* v. *Greenwich* (*i*) ſtated that the pauper was the daughter of *George Wall* deceaſed, *who in his life time declared* to a witneſs now examined that he had hired himſelf for a year and ſerved a year as a livery ſervant at 7l. wages to Captain *Saunderſon*, who had a houſe and family at *Greenwich*, and reſided there when not abſent on the king's ſervice; that his maſter made frequent voyages to *Holland*, whither he attended him; that he never was 40 days together at *Greenwich*, but during his ſervice might be there 40 days at different times. Afterwards it was more fully ſtated that he did reſide 40 days at *Greenwich* at different times; and the order adjudging the ſettlement in *Greenwich* was affirmed. Now both theſe caſes are directly in point, and there was no evidence which at all tended to prove a ſettlement but hearſay; for in the caſe of *Nutley*, the wife having ſeen her huſband twice in the ſervice was no evidence of a hiring for a year; and in the caſe of *Greenwich* it does appear what paſſed when the caſe went down to the ſeſſions again; for then it was more fully ſtated that the pauper's father reſided 40 days at *Greenwich* at different times; and upon that the order of removal was affirmed *on the declarations of the father alone*. And when the point was only whether hearſay evidence could be received, we cannot ſuppoſe other evidence, which is not ſtated, to have been given, which rendered that point immaterial, or varied the effect of it. Thirdly, it was argued that even if the declarations were evidence, yet there muſt be ſome concurrent evidence to ſupport it; and this was ſuppoſed to have been ſo held in the caſe of *Coln St. Aldwin's*; but that caſe was founded on very clear grounds, and not a word ſaid in it about concurrent evidence, as appears from the note of Mr. Juſtice *Clive* which I have before mentioned. Neither

(*i*) *Bott*. 281. *Burr. S. C.* 243. S. C.

does any caſe whatever ſay that there muſt be concurrent evidence. Where the queſtion is, whether the evidence be admiſſible or not, it is difficult to conceive what is meant by concurrent evidence; but every caſe on the ſubject which at all applies to this point, conſiders it as clear that the evidence may be received. The two caſes of *Nutley* and of *Greenwich* are directly in point; and they are confirmed by thoſe of *Creech St. Michael*, (*k*) and of the Inhabitants of the *Holy Trinity* in *Wareham*; (*l*) in the firſt of which the pauper having run away, a copy of the Regiſter was proved, and then a witneſs ſwore that *John Every* who was dead was *conſidered* as the pauper's father, and that he knew *Mary Every* who lived in *P.* and whom he *underſtood* to be the pauper's mother, and *heard* the pauper *call* her mother: the ſeſſions held the evidence not to be ſufficient, but the Court of King's Bench held that it was. In the caſe of the *Holy Trinity* in *Wareham*, it was proved that the pauper's huſband was born in *Beer Regis*, and proved by the pauper that her huſband was abroad beyond ſea, and had been two years, if alive; that to her knowledge he lived in the capacity of an hoſtler with Mrs. *Lee*, in *Wareham*, about two years, where ſhe ſaw him brew; but whether there was any agreement or hiring relating to ſuch ſervice was not proved; but ſhe had *heard* her huſband *ſay* that he was ſettled in the *Holy Trinity*, *Wareham*. The court held that evidence ſufficient to prove the ſettlement: and the reporter of that caſe ſubjoins in a note that in caſes where the perſon under whom the pauper claimed has been dead, *hearſay evidence from his widow, or from other perſons, of his declarations reſpecting his ſettlement have frequently been received*; and inſtances the caſes of *Greenwich* and *Nutley*; but he obſerved that till that caſe there had been no inſtance where the court had permitted ſuch hearſay evidence to be received *in the life* of the perſon under whom the ſettlement was claimed. The reporter who has great merit with the profeſſion for his induſtry and attention on the ſubject of the poor laws, proceeds to ſuggeſt his doubt of the determination of the court in that caſe: but, on the beſt conſideration that I can give

(*k*) *Burr. S. C.* 765. (*l*) *Cald.* 141.

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it, that doubt does not appear to be well founded: for it has long been ſettled that if a perſon be abroad, and ne likely to return, or in a ſtate incapable of being examined, he is conſidered, as to that purpoſe, as if he were dead. The other caſes which were quoted in the argument, do not apply to the preſent, namely, *Rex* v. *Great Bedwin*, (*m*) *R.* v. *St. Michael* in *Bath*, (*n*) *R.* v. *St. Saviour's Southwark*, (*o*) and *R.* v. *St. Sepulchre*. (*p*) But it is worthy of obſervation that in the caſe of *R.* v. *Nutley* it is ſtated on one ſide to be the conſtant practice of other ſeſſions to receive ſuch hearſay evidence, and it is admitted on the other ſide that the evidence of the widow reſpecting the declaration of her huſband, was admiſſible. So in the note before mentioned on the caſe of the *Holy Trinity* in *Wareham*, it is ſaid that ſuch hearſay evidence has been frequently received. If there has been a conſtant and uniform practice at all the ſeſſions in the kingdom, I think it requires great conſideration before we overturn it; for, beſides the great inconvenience, confuſion, and inconſiſtency, which will be introduced by a new determination, we ſhall hereafter undoubtedly be ſubject to the ſame comment and cenſure as Lord Chief J. *Ryder*, in the caſe of *St. Botolph's* without *Biſhopſgate*, (*q*) threw on another determination, when he ſaid, "it "does not appear in the caſe of *Stretford* v. *Norton*, "whether theſe other caſes were cited, or what was "the particular reaſon of the reſolution; however, if "they were cited and over-ruled, we may for the ſame "reaſon over-rule that determination." I have inquired what is the uſage at different ſeſſions, and I find that throughout the Weſt of *England*, in the North of *England*, and in other places, it has been the conſtant practice to receive ſuch evidence. I have heard of no one ſeſſions in which a different practice prevails; and if it be in univerſal uſe, why ſhould we overturn it? If on ſuch a queſtion ariſing on a ſettlement caſe we are to go into firſt principles, I know not where we are to ſtop. It has been underſtood as pretty clear law that, in queſtions, of pedigree and ſome other caſes, *hearſay*, and *reputation*, are good evidence; but if the evidence ſtat-

(*m*) *Burr. S. C.* 584.
(*n*) *Bott.* 394.
(*o*) *Bott.* 149.
(*p*) *Tr.* 25 *Geo.* 3.
(*q*) *Burr. S. C.* 872.

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ed in this caſe be not allowed, they alſo will ſtand on a very ſhallow and ſlippery foundation. Each has *authority* to ſupport it; and if that be taken away, I can ſtate no *principle* in favour of them. The true line for courts to adhere to is, that, wherever evidence not on oath has been repeatedly received, and ſanctioned by judicial determinations, it ſhall be allowed; but beyond that, the rule, that no evidence ſhall be admitted but what is upon oath, ſhall be obſerved. It would be eaſy to ſtate or imagine a converſation in which a man gave an account of his own habits and tranſactions in life, his reſidence, his connections, and relations, which would be equally material in tracing a title, as inveſtigating a queſtion of ſettlement; and it would be ſtrange if ſuch a converſation after the father's death ſhould be ſufficient to enable the ſon to recover an eſtate of 10,000l. a year, and yet ſhould not be ſufficient to give his ſon a ſettlement as a pauper. Hearſay evidence has been received to prove whether land were or were not parcel of a certain tenement; and was adjudged to be good evidence in *Davies* v. *Pearce*, (*r*) and *Holloway* v. *Rakes*. (*ſ*) It is conſtantly allowed in all caſes of pedigree, though from perſons not of the family, as in *Brown* v. *Shelley*, *Eaſter* 1776; and alſo in the caſes of cuſtoms; and has been received even in the caſe of ſingle facts; as of a marriage, being in orders, and of a preſentation; *Harſcot's* caſe, *Comb.* 202, and the Biſhop of *Meath* v. Lord *Belfield*. (*t*) In the laſt caſe the name of the patron who preſented was omitted in the regiſter, and this court on a writ of error held that parol evidence might be received of it; for (ſaid they) a preſentation may be by parol, and what commences by parol may be tranſmitted to poſterity by parol; and that creates a general reputation. A hiring for a year may be by parol. Hearſay evidence has been allowed to prove it in all the caſes I have mentioned, and has been rejected or denied in none. I am of opinion that thoſe caſes ought to be adhered to, and conſequently that the order of ſeſſions ſhould be affirmed."

ASHHURST, J. "If this were a new caſe, I ſhould

(*r*) *Ante*, 2 *vol.* 53.
(*ſ*) *M.* 12 *Geo.* 3. *B. R.* cited *ante*, 2 *vol.* 55.
(*t*) 1 *Wilſ.* 215.

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be ſtrongly of opinion that the evidence given ought not to have been received, as being hearſay evidence. But I think that, as certainty is ſo deſirable in the law in general, and particularly in this branch of it which relates to caſes of daily occurrence, when a caſe has been decided and acted upon, it is better not to overturn it. In the caſes of *R.* v. *Nutley*, and *R.* v. *Greenwich*, which have been ſtated, and which I ſhall not repeat, it was determined that ſuch evidence is admiſſible; and this not as a mere *obiter dictum*, but upon deliberation: and in the latter of them it was thought ſo material that the caſe was ſent down to have the fact more explicitly ſtated, and on its being returned ſo ſtated, the order was affirmed here. There are other caſes in which this kind of evidence is allowed by univerſal conſent; as in the caſe of a pedigree; and if we were to overturn the caſes which have been determined on ſettlements, we may as well overturn the law in caſes of pedigree; for I do not know any reaſon which applies to the one that is not equally applicable to the other. In both, the ſubject matter of litigation is concerning the ſtate and condition of the party. It is natural for perſons to talk of their own ſituations and of their families. The evidence is in its nature of an unſuſpicious kind; it is generally brought from remote times, when no queſtion was depending or even thought of, and when no purpoſe would apparently be anſwered. In theſe caſes, in general, it is perhaps of little conſequence to the pauper whether he belong to one pariſh or to another; the diſpute is between the two pariſhes which ſhould bear the burden of maintaining him. The pauper himſelf (when capable of being produced) is competent to give evidence relative to his ſettlement. In the two caſes alluded to it was held that, when he is dead, his declarations may be received in evidence; and the being in a ſtate of infanity which introduces the ſame impoſſibility of producing him as if he were dead, makes the evidence equally admiſſible. With regard to the ſtatute 13 & 14 *Car.* 2. it rather ſeems to me that on that ground alſo this evidence is admiſſible. We are not to ſuppoſe that the party was taken before the juſtices and examined upon oath before them, as a matter of mere idle curioſity; nor can we imagine that the juſtices would have interfered in it merely to gratify

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ſuch curioſity. We muſt take it therefore that the thing paſſed in the way of a judicial proceeding; and though for ſome reaſon it happened that the examination was not acted upon, we cannot but ſuppoſe, that at the time, it was taken as the foundation of an order of removal. At all events this renders the declaration of greater ſolemnity than an idle declaration in the courſe of common converſation. As this matter has been already ſo fully gone into by my brother *Buller*, with whoſe ſentiments I entirely concur, I ſhall not add more than that I agree with him in thinking that the orders ought to be affirmed."

Lord KENYON, C. J. "As far as the intereſts of theſe contending parties are concerned. I might excuſe myſelf from entering into a diſcuſſion of this queſtion; for, as two of my brothers have already declared their opinions againſt making the rule abſolute, it cannot be made ſo, as my opinion, added to that of my brother *Groſe's*, will not make a majority. But as this is a matter of importance, I ſhould feel myſelf liable to great reproach, if I were to ſuffer this queſtion to paſs without declaring my opinion. All queſtions upon the rules of evidence, are of vaſt importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the ſupport of theſe rules, which have been matured by the wiſdom of ages, and are now revered from their antiquity and the good ſenſe in which they are founded: they are not rules depending on technical refinements, but upon good ſenſe; and the preſervation of them is the firſt duty of Judges. The evidence ſhould be given *under the ſanction of an oath legally adminiſtered, and in a judicial proceeding depending between the parties affected by it, or thoſe who ſtand in privity of eſtate or intereſt with them.* I admit that this man who was proved to be inſane is to be conſidered as to this purpoſe in the ſame ſtate as if he were dead: and it has been decided that in ſuch caſes the party's hand writing may be proved as if he were actually dead. Then it is ſaid that there are two grounds on which his examination may be received, as to both of which I agree with my brother *Groſe*. 1ſt, As an examination taken upon oath before two juſtices of the peace, who, it is argued, had authority to take it. 2dly, As a declaration of the party examined.

amined. I will briefly conſider both theſe poſitions. The firſt depends on the ſtat. 13 & 14 *Car.* 2. That ſtatute empowers the juſtices to make an order of removal; it does not give them an expreſs power to examine; but, as an examination is neceſſary to get at the facts upon which the judgment of the magiſtrates is to proceed, there is an incidental power given, allowing them to examine when they are called upon to exert their power of removal. But in this caſe they were not applied to for the purpoſe of making an order of removal; the overſeers called upon them for no other purpoſe than to examine the pauper; all the proceedings therefore were extrajudicial; and the examination on oath might juſt as well have been taken before the pariſh clerk, and would have been as much entitled to credit as this. But I will go further: If this examination had been taken in order to found an order of removal upon it, ſtill I ſhould have been of opinion that it would be no better, as far as reſpects the preſent queſtion, than a mere declaration of the party, the effect of which I ſhall conſider preſently. Examinations upon oath, except in the excepted caſes, are of no avail unleſs they are made in a cauſe or proceeding depending between the parties to be affected by them, and where each has an opportunity of croſs-examining the witneſs; otherwiſe it is *res inter alios acta*, and not to be received. It has been ſaid that this is a *judgment* of the juſtices, as appears by the 2d ſection of the 13 & 14 *Car.* 2. which has the word *judgment* in it; and that it is no objection to its being a valid judgment that the parties to be affected were not preſent. But I think the word *judgment* in the ſection referred to is only uſed as equivalent to the word *opinion*. And as to a judgment being binding, though the party to be affected was not preſent, I think it will ſcarcely be found that that is ſo, unleſs in caſes where the party has had an opportunity of being preſent, or was contumacious, neither of which was the caſe with the pariſh now to be affected; but as to them it was altogether *res inter alios acta*. It has been ſaid that there are caſes where examinations are admitted, namely, before the coroner, and before magiſtrates in caſes of felony. That obſervation appears to me to go rather in ſupport of the general rule than in deſtruction of it. Every exception that

Depoſitions.

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can be accounted for is so much a confirmation of the rule that it has become a maxim, *exceptio probat regulam*. Those exceptions alluded to are founded on the statutes of *Philip & Mary*, (*u*) and that they go no further is abundantly proved. Besides, the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and writs of *ad quod damnum* have been frequently set aside for want of this notoriety in the execution of them by the sheriff. But, without stating the cases which occur on this head, I will do little more than refer to the case of the *King* v. *Paine* in *Salk.* 281. & 5 *Mod.* 163. That was not loosely decided, but was the opinion of this Court, assisted by the Court of Common Pleas. In *Salkeld* it is expressly said that the rule cannot be extended further than the particular case of felony; and in the other book the Chief Justice declared that the depositions were not evidence; and a weighty reason is given, namely, "the defendant not being "present when they were taken before the mayor, and "so had lost the benefit of a cross-examination." This case is adopted in 2 *Hawk. Pl. C.* c. 46. *f.* 1. 10. which with the subsequent sections of that chapter are worth consulting.

Hearsay Evidence.

Secondly, considering this as a declaration of the party, I am at a loss to find the grounds on which it can be received. I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to *pedigrees*; but evidence of what a mere stranger has said has ever been rejected in such cases. That however has been always understood to be an excepted case, and to stand on reasons peculiar to itself, which I need not take up time by stating. If the exception go further, I should have wished to have heard it stated and defined; for unless that is done I am much afraid we may endanger a rule of infinite importance to every individual, and by suffering exceptions to creep on one

(*u*) 1 and 2 *Ph. & M. c.* 13. as to depositions before the coroner; and 1 & 2 *Ph. & M. c.* 13. and 2 & 3 *Ph. & M. c.* 10. before justices of the peace in cases of felony.

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after another, leave nothing like a rule. It has been ſaid that in the caſe of *the Biſhop of Meath* v. *Lord Belfield*, (x) in a *quare impedit*, the plaintiff gave in evidence an entry in the regiſter of the dioceſe of the inſtitution of one *Knight*, in which there was a blank in the place where the patron's name is uſually inſerted; upon which parol evidence of the general reputation of the country that *Knight* was in by the preſentation of one under whom Lord *Belfield* claimed was offered; and that upon a bill of exceptions it was held that the evidence was admiſſible; that it was ſaid that a preſentation may be by parol, and what commences by parol may be tranſmitted to poſterity by parol: I have not ſeen the report of that caſe: But this I admit, that a preſentation may be by parol, and that may be proved by parol, that is, by a witneſs who was preſent and heard it; but that common reputation might be given in evidence I muſt deny; if it could, why might not ſuch evidence decide upon titles to eſtates, at leaſt before the ſtatute of frauds, when no written inſtrument was required to make a good leoffment of the greateſt landed property in the kingdom. In ſhort it being admitted that the rule for which I contend is undoubtedly the general rule, the evidence offered in this caſe muſt be rejected, unleſs an exception in favour of it has been adopted in ſuch a manner as to incorporate it into the law of evidence. For where is the line to be drawn? If the court admit ſuch an examination to be evidence againſt a claſs of perſons who are ſtrangers to it, how ſhall we ſtop ſhort and ſay, that it ſhall not be evidence againſt any other? I cannot ſay how far ſuch an idea might go. This brings me to the caſes cited and to the ſuppoſed uſage. And, as to the firſt, there is no one caſe in which the point has been decided. In *R.* v. *Nutley*, (y) the whole of the wife's evidence was diſregarded, whereas a fair inference might be drawn to prove her huſband's ſettlement, from the facts which ſhe ſwore to within her own knowledge; for every hiring is preſumed to be for a year, unleſs ſomething is ſtated to prevent that inference; and therefore the Court

(x) 1 *Wilſ.* 215. (y) *Burr. S. C.* 701.

quashed the order of Sessions on that ground. As to the case of *Greenwich*, (z) the Sessions the second time found the *actual fact of the service* for 40 days in the parish. Then as to the case of St. *Sepulchre*, (a) the only point there determined by the Court was that they could not receive parol evidence of an indenture not proved to be lost. And in that of *The Holy Trinity* in *Wareham*, enough appeared from the facts, which the wife spoke to from her own knowledge, to leave the Court to support the conclusion which the Sessions had drawn. There is therefore no case in which this point was the very hinge on which it turned. But even if there had, as it would have stood single in opposition to a series of cases, I should not have placed much reliance on the superstructure when the foundation failed. But the observations I have made upon the cases alluded to I think warrant me in saying that though there were some expressions tending to shew that such evidence might be received, yet it was not the *ground of decision* in any of them; they amounted only to *obiter dicta*; or even let them be called *solemniter dicta*; and at least they seemed to have proceeded on a supposed general usage at the Quarter Sessions. This therefore brings me to that which was the last topic of argument. The proposition which is stated is this, that the justices of peace in Sessions having in general received such evidence as this their usuage creates a rule by which we are to proceed. I have great respect for that class of magistrates; I know their most important utility, and have much regard for many of them individually; but I confess there is something of novelty in that argument which refers those whom the constitution of the jurisprudence of this country hath invested with the power of correcting the errors of justices of the peace to the practice of those very persons to learn the rules of evidence by which they are to proceed. I remember a case of *Baldwin et ux.* v. *Blackmore*, which is reported in 1 *Burr.* 595. and of which I have a MS. note, and a full memory; where justices of the peace had committed a man and his wife for returning to a parish from whence they had been removed by an order. The action was

(z) *Burr. S. C.* 243. (a) *Tr.* 25 *Geo.* 3.

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brought by the huſband and wife on the ground that the wife had been improperly committed; the caſe was twice argued, and the uſage of committing *femes covert* was inſiſted upon; and it rather appeared at laſt that ſome part of the Bench were inclined to give countenance to ſuch an uſage; but I well remember that Mr. Juſtice *Forſter* treated the argument with more indignation than is expreſſed by Sir *James Burrow* in his account of that caſe. I perfectly well recollect that learned Judge's ſaying that he had heard that *communis error facit jus*, but he hoped he ſhould never hear that rule inſiſted upon, to ſet up a miſconception of the law in deſtruction of the law. I ſhould have diſdained to ſay any thing on this poſition, unleſs it had received the appearance of ſome countenance in the caſes I have mentioned, and in the diſcuſſion of this caſe. It is the whole ground of the opinions hinted at in the other caſes. But I could give ſome account of the uſage during the many years I practiſed at the Seſſions, and I confeſs I never heard of ſuch evidence being received there. The practice I know varies according to the uſage of each county where the Seſſions are held. And I ſhould as ſoon reſort to the uſage of every pariſh in the kingdom on a queſtion concerning the rateability of perſonal eſtate. But I will not enter more into this point, as I am clear it would be moſt dangerous to adopt it. The miſtakes of Judges, provided they became univerſal, would according to that doctrine become rules of law. An uſage, commencing at ſooneſt ſince 13 & 14 *Car.* 2. contrary to law, and working injuſtice every day it was perſiſted in, would ſupercede the law. Upon the whole I am moſt clearly of opinion that this examination was not admiſſible in evidence. It was *ex parte*, obtained at the inſtance of thoſe overſeers whoſe pariſh was to be benefited by it, and behind the backs of the pariſh againſt whom it has now been uſed, without having an opportunity of knowing what was going on, or attending to have the benefit of a croſs-examination. I regard the queſtion as of the laſt importance, and as putting in danger the Law of Evidence

dence in which every man in the kingdom is deeply concerned.

The majority of the Court not being of opinion that the rule for reverſing both the orders ſhould be made abſolute.

They conſequently ſtand confirmed.

No.

No. 2.

CASE RESPECTING THE GENERAL RULES AS TO THE INTEREST OF WITNESSES.

Bent againſt Baker and another in Error. 3 *T. Rep.* 27.

THIS was an action of *aſſumpſit* on a policy of aſſurance brought in the Court of Common Pleas, to which the defendant pleaded the general iſſue. At the trial, the counſel for the defendant below produced one *George Bowden* an inſurance broker as a witneſs to prove circumſtances tending to ſhew that the under-writers on the ſame policy were not liable to pay the loſs: who being ſworn ſaid, that he was employed as a policy-broker by the plaintiffs to procure the policy of aſſurance in the declaration mentioned to be ſubſcribed by the defendant and the ſeveral other perſons, whoſe names are ſubſcribed thereto as aſſurers. And that he, as ſuch policy-broker, procured the ſame to be ſubſcribed by the defendant as an aſſurer for 100l. in ſuch manner as in the declaration is in that behalf mentioned: and that he within the ſpace of one hour after the ſaid policy had been ſo ſubſcribed by the defendant, and the other perſons, whoſe names are ſubſcribed thereto prior to the witneſs, ſubſcribed the ſame policy for the ſum of 200l. and became an aſſurer to the plaintiffs: and that an action had been commenced againſt him at the ſuit of the plaintiffs; and was then depending as ſuch aſſurer for the ſaid 200l. for and in reſpect of the ſaid loſs alleged in the declaration; *and in which action the ſame queſtion was depending as in this action againſt the defendant*; and that he expects to contribute to the expenſe of defending this action againſt the defendant. And alſo that he together with the defendant, and ſeveral other under-writers upon the ſame policy had filed a bill in equity in the Court of Exchequer againſt the plaintiffs, for a diſcovery

A broker, who underwrites a policy of inſurance after getting it underwritten by others, is a competent witneſs for the defendant in an action againſt any of thoſe who underwrote before him. And if he had engaged to contribute to the defendant's coſts, and has an action depending againſt himſelf on the ſame policy, and has joined as a plaintiff in a bill in equity for a diſcovery, the objections ariſing from theſe circumſtances may be removed by the defendant's releaſing him from any contribution to the coſts in law or in equity, and by an offer by himſelf and the defendant to pay the coſts

in equity, and to diſmiſs the bill as to them. In general a perſon is a competent witneſs unleſs he be intereſted in the event of the ſuit.

ry of divers matters reſpecting the policy and aſſurance for the purpoſe of avoiding the ſame, and alſo praying to be relieved againſt the ſame; which bill in equity was then depending in the Court of Exchequer. And thereupon the counſel for the plaintiffs on behalf of the plaintiffs, objected to the admiſſion of the ſaid *George Bowden* as a witneſs, and inſiſted that he was not a competent witneſs on behalf of the defendant upon the iſſue joined between the ſaid parties; whereupon the defendant and his attorney produced a releaſe duly executed by them to the ſaid *George Bowden* of all demands for any proportion or contribution of any coſts, either at law or in equity, to be paid by him the ſaid *George Bowden*; and it was then and there offered, on the behalf of the defendant and the witneſs by their attorney, to pay to the plaintiffs the coſts of the ſuit in equity, and that they would at their own expenſe procure the bill in equity to be diſmiſſed as to them; but which offer the plaintiffs did not accept, alleging that the ſuit was ſtill depending and there were other plaintiffs therein beſides the defendant and *George Bowden*; whereupon the ſaid chief juſtice refuſed to admit the evidence of the ſaid *George Bowden*. And the counſel for the defendant then excepted to the opinion of the chief juſtice; inſiſting that the ſaid *George Bowden* was a competent witneſs for the defendant touching the matters in queſtion. The whole of this proceeding appeared on the bill of exceptions, which was tendered to and ſigned by *Lord Loughborough*. And it having been removed into this Court by a writ of error, and errors aſſigned, it was now argued by *Chambre* for the plaintiff in error, and *Wood* for the defendants.

Lord KENYON, C. J.—After ſtating the caſe—ſaid, the queſtion is, whether under all theſe circumſtances *Bowden* was or was not a competent witneſs. I premiſe with mentioning what was ſaid by Lord *Mansfield* (*a*) on this ſubject, That "the old caſes, upon the competency of witneſſes, have gone upon very ſubtile "grounds. But of late years the Courts have endeavoured, as far as poſſible, conſiſtent with thoſe authorities, to let the objection go to the *credit*, rather than

(*a*) *Walton v. Shelley*, 1 vol. 300.

"to

"to the *competency* of a witneſs." And if the opinion of ſo great a judge ſtood in need of any ſupport, it would have it from the ſentiments of Lord *Hardwicke*, in the caſe of *King* v. *Bray*, (*b*) who ſaid that whenever a queſtion of this ſort aroſe on which a doubt might be raiſed, he was always inclined to reſtrain it to the credit, rather than to the competency of the witneſs, making ſuch obſervations to the jury as the nature of the caſe ſhould require. Now fortified with two ſuch authorities as theſe, I have no ſcruple in declaring my concurrence that, wherever there are not any poſitive rules of law againſt it, it is better to receive the evidence of the witneſs, making nevertheleſs ſuch obſervations on the credit of the party as his ſituation requires. Then it is to be conſidered, what is the queſtion put to a witneſs on his *voir dire*. It is, is he really intereſted in the cauſe? Sometimes, indeed, the counſel enter into the detail, and aſk *how* he is intereſted. But the general queſtion involves in it all the others, and amounts to this, whether the record in that cauſe will affect his intereſt? Upon that ground has the caſe of commoners proceeded: It is very probable that in *preſcriptive* rights of common other perſons living in the ſame manor may have correſpondent rights: yet, unleſs the queſtion turns on a *cuſtom* equally beneficial to them all, the teſtimony of one muſt be admitted to prove his neighbour's right. But if the right be claimed under a *cuſtom* that all the inhabitants of the pariſh ſhall have a right of common, all thoſe who fall under that deſcription are intereſted, becauſe the verdict in that cauſe may afterwards be uſed as evidence to eſtabliſh the ſame right in the reſt.

Now in this caſe, the objections made to this witneſs are reſolvable into the three mentioned by the plaintiff's counſel. Firſt, that he had a direct intereſt in the ſuit. It is true that he had an intereſt when he came into Court to give his evidence by virtue of that engagement which he had made: but the bill of exceptions alſo ſtates that a releaſe was executed to him, which entirely removed that objection. The next objection is that the witneſs was party to a ſuit in equity, and that eventually he might be liable to the coſts;

(*b*) *Rep. Temp. Hard.* 340.

But

But no perſon but the plaintiff's below could call on him for thoſe coſts; now the defendant below and the witneſs offered that the bill ſhould be diſmiſſed as to them at their own coſts, which however was refuſed: But after ſuch a refuſal neither in juſtice or common ſenſe can we ſuffer thoſe parties to make the objection. Then the remaining objection is that he was an underwriter on the ſame policy. I muſt acknowledge that there have been various opinions upon this ſubject, and that it is impoſſible to reconcile all the caſes. Then we have only to conſider what are the principles and good ſenſe to be extracted from them all; I think the principle is this, *if the proceedings in the cauſe cannot be uſed for him he is a competent witneſs, although he may entertain wiſhes upon the ſubject, for that only goes to his credit and not to his competency*; as where he ſtands in the ſame ſituation with the party for whom he is called to give evidence, there is no doubt but that it may influence his teſtimony; or where a father is giving evidence for the ſon; but this does not render him incompetent, and ſuch circumſtances are always open to obſervation. So here the witneſs might have had his wiſhes; his ſituation might have created an influence on his mind; but the queſtion ſtill is, whether he was a competent witneſs: on the grounds I have already ſtated, I think he was. But there is alſo another reaſon for admitting the evidence of this witneſs, on the authority of the caſe in *Skinner*; where it was ruled by Lord C. J. *Holt*, that *where a perſon made himſelf a party in intereſt, after a plaintiff or defendant has an intereſt in his teſtimony, he may not by this deprive the plaintiff or defendant of the benefit of his teſtimony.* Then what was the ſituation of theſe parties? We muſt recollect that the broker, who effects the policy, is the witneſs whoſe teſtimony muſt be reſorted to by both parties in caſe of any diſpute. He afterwards ſigned the policy himſelf, which he could not have done without the concurrence of the aſſured themſelves, who had before entered into the contract with the defendant below through the medium of this broker; and therefore he was not to be deprived of the benefit of his witneſs by the very act of the plaintiffs themſelves, who objected to his teſtimony at the trial. Then it has been ſaid that a perſon cannot be permitted to give evidence to invalidate

invalidate an inſtrument which he himſelf has executed: but I cannot aſſent to that as a general propoſition. For I remember a caſe of a trial at the bar of this Court (*c*) where all the ſubſcribing witneſſes to Mr. *Jolliffe's* will were permitted to give evidence of the inſanity of the teſtator at the time of making it. Now in that caſe they came to deſtroy the inſtrument which they had atteſted: and though their teſtimony was ultimately diſcredited, yet no doubt was entertained reſpecting their competency, I therefore entirely agree with the diſtinction taken by my brother *Buller*, that where a perſon has ſigned a *negotiable* inſtrument, he ſhall not be permitted to invalidate it by his teſtimony. But that is not the caſe here. However theſe are only the ſmall points in the cauſe. And I again recur to that which is the principal ground of my opinion, namely, that the witneſs was not intereſted in the cauſe then depending, neither could the verdict by any poſſibility be produced by him in any ſubſequent ſuit.

ASHHURST, J.—There is ſo great a contradiction in deciſions reſpecting the boundaries of evidence, that I rather chooſe to give my opinion on the particular circumſtances of this caſe, than to lay down any general rule on the ſubject. The witneſs was called to prove that an under-writer on the ſame policy was not liable. Perhaps in ordinary caſes one under-writer cannot be examined as a witneſs for or againſt another on the ſame policy; but the particular ſituation in which this witneſs ſtood makes a great difference; for he had acted as the broker, and could not by any act of his own deprive either party of his teſtimony by his afterwards ſigning the policy. From the nature of his ſituation he muſt be the beſt witneſs for many purpoſes; and if he knew of any previous ſecret circumſtances which would invalidate the policy, he was committing a fraud on the reſt of the under-writers. And if we were to reject the teſtimony of this witneſs, it would be open to this further objection, that the aſſured might collude with the broker, after he had obtained other ſubſcriptions, and prevail on him to ſubſcribe the ſame policy in order to deprive the under-writers of the benefit of his evidence.

(*c*) *Lowe* v. *Jolliffe*, 1 *Bl. Rep.* 365.

BULLER, J.—This caſe involves in it the queſtion which has been ſo repeatedly agitated in courts of law, what objections go to the *credit*, and what to the *competency* of the witneſs; than which no queſtion is more perplexed. I believe it was firſt held in *Ridout* v. *Johnſon*, that one under-writer cannot be a witneſs for another; I have taken great pains (though without ſucceſs) to get the real ſtatement of that caſe, becauſe it may perhaps have been determined on its own particular circumſtances. However, in conſequence of that determination, judges at *Niſi Prius* have frequently rejected under-writers as witneſſes; nor is it extraordinary that at *Niſi Prius* they ſhould have been guided by the only caſe upon the ſubject without much examination into the grounds of it. But it is neceſſary now to decide the queſtion in a more ſolemn manner. With regard to two of the objections, which have been argued at the bar, they are not entitled to much conſideration. The firſt of them is that the witneſs was intereſted, becauſe he was to contribute to the coſts; the releaſe is a clear and deciſive anſwer to that. The other is that he was liable to pay the coſts in the ſuit in equity; and the anſwer to that is that he did every thing which he could to diſcharge himſelf from that objection, by offering to diſmiſs his bill at his own coſts. The caſe of *Goodtitle* v. *Wellford* (*d*) ſhews that if a perſon who is tendered as a witneſs, does every thing in his power to get rid of any objection to his teſtimony, it ſhall not be competent to the other party by an obſtinate refuſal to prevent his being examined. Then the remaining and principal queſtion is whether this witneſs, having ſubſcribed this policy as an under-writer, has thereby rendered himſelf altogether incompetent; becauſe if he were competent to anſwer *any* queſtions, he ought not to have been rejected *generally*. Then we muſt ſee whether on this record, the fact to which he was required to ſpeak might be ſuch as he was competent to anſwer. On the principle of neceſſity alone I think this witneſs ought to have been received. If the queſtion intended to be put to him were as to any repreſentation made by him to the under-writers at the time of

(*d*) *Dougl.* 134.

ſubſcribing,

ſubſcribing, he muſt be admitted as a witneſs from neceſſity; for he was the only perſon who from the nature of the thing could ſpeak to that tranſaction, and as ſuch the under-writers had a right to call on him for his teſtimony. For it is ſcarcely poſſible that that which he alleged to the under-writers when they ſubſcribed could be proved by any other perſon. Beſides it is admitted that if he had been called as an agent, he might have been examined; now *non conſtat* but that was the caſe here; and as he was rejected generally, the judgment muſt be reverſed. On the general ground, whether one under-writer can be examined for another who has ſubſcribed the ſame policy, I incline to think there is no objection to his competency. When the caſe of *Walton* v. *Shelly* was argued here, I looked into all the caſes on the ſubject, and particularly into thoſe on this head. The court in that caſe approved of what was laid down by *Lord Hardwicke* in *R.* v. *Bray*, that it was better to lean againſt objections to the competency, and to let them go to the credit of the witneſs. The true line I take to be this, *is the witneſs to gain or loſe by the event of the cauſe?* Now this witneſs could not gain or loſe by the event of this cauſe, becauſe the verdict could not be evidence either for or againſt him in any other ſuit. This has been likened to caſes where witneſſes have been rejected on the ground, that they ſhall not be permitted to invalidate inſtruments which they themſelves have ſigned; but the ground of that objection is, that it is holding out falſe credit to the world, and muſt be confined to *negociable* inſtruments. If a perſon were permitted to ſet aſide ſuch an inſtrument, it would enable him to commit a fraud. But for the reaſons which I have ſtated, I think this witneſs ought to have been received; the conſequence of which is that the judgment muſt be reverſed, and a *venire de novo* muſt iſſue returnable in this Court.

GROSE, J.—With reſpect to the general queſtion whether the witneſs's being intereſted in the *queſtion* put to him ſhall render him incompetent, as well as his being intereſted in the *event of the ſuit*; I think it is better to narrow the objection to thoſe caſes where the witneſs is intereſted in the *event of the cauſe*. So much has already been ſaid on this ſubject, that I am ſatisfied with declaring my aſſent to the rule, that unleſs the witneſs

witneſs be intereſted in the *event of the ſuit*, he ſhall be admitted, except in thoſe exceptions which have been eſtabliſhed by ſolemn deciſions. On the other ground that a witneſs ought to be received from neceſſity, I think this falls within the caſe cited of a wager; and whatever may have been ſaid in the caſe in *Levinz*, the caſe in *Skinner* is a clear authority to the general point. And that I find has been ſince adopted in another caſe of *George* v. *Pearce*, before *Gould*, J. who held that it was no objection to the competency of a witneſs, that he had laid a wager on the event of the cauſe. And that convinces me that Mr. J. *Gould* meant to follow the ſame rule which had been laid down by Lord *Holt* in the caſe in *Skinner*. So that the rule is, that a perſon, in whoſe evidence another has gained an intereſt, ſhall not by his own act deprive the other of the benefit of his teſtimony. Now in this caſe the witneſs was the broker who effected the policy, and was the only perſon who could ſpeak to many facts material to the cauſe. Therefore on this, as well as on the other ground, I think he ought to have been admitted. And if he were competent to anſwer any queſtion, he ought not to have been rejected.

Judgment reverſed; and a *venire de novo* awarded.

No.

No. 3.

CASES AS TO THE ADMISSIBILITY OF THE PARTIES INJURED, ON CRIMINAL PROSECUTIONS.

Abrahams, qui tam, v. Bunn. 4 *Burr.* 2251.

In an action for uſury bro't by a third perſon; the borrower of the money is a competent witneſs to prove the borrowing of the money, and payment of it.

THIS was an action for an uſurious contract, tried before Lord *Mansfield*, at *Guildhall*; and a verdict found for the plaintiff. Upon which, a motion had been made, on the part of the defendant, for a new trial, and a rule granted to ſhew cauſe. The motion was founded upon the incompetency of the plaintiff's witneſs. The name of the witneſs was *Benjamin Abrahams*. He was the *borrower* of the money; and was called, on the part of the plaintiff, to prove the uſurious contract. He was ſworn in chief; and examined, and croſs-examined, before he was objected to. He proved the defendant to be a pawnbroker; and that he had pledged ſeveral jewels with him, on ſeveral loans; ſome of which were redeemed: and he owned that this *pledge had been returned*, on the money borrowed upon it being paid. The contract was proved by him to be uſurious; and he proved it as it was charged in the declaration. At the trial after this man had given his *whole* evidence, it was objected that he could not be a *competent* witneſs, unleſs the *repayment* of the money was proved; and that *he* himſelf was not competent *to prove the repayment* of it.

After this caſe had been fully argued at the bar, the Court having taken time to adviſe—Lord Mansfield now delivered their opinion.

This was a motion for *a new trial*; becauſe *Benjamin Abrahams*, ſaid to be an *incompetent witneſs*, was examined, and his evidence left to the jury. It was a *qui tam* action upon the ſtatute againſt uſury. All the counts charge "that the defendant took, accepted, and received *from Benjamin Abrahams*, the ſum of ſo much by way of corrupt bargain and loan, for his forbearing and giving time of payment from ſuch a day to ſuch a day

day of the ſum actually lent." There was *no* count as to any *bond*, *aſſurance*, or *contract*, whereupon or whereby uſury was reſerved or taken. At the trial *Benjamin Abrahams* was examined for the plaintiff; and ſwore that the defendant was a pawnbroker; that he borrowed from the defendant ſeveral ſums of money, (ſpecifying the times and ſums) upon pawns (ſpecifying them and their value,) which were always more than double the value of the money advanced. He ſwore to his having redeemed the pawns (ſpecifying the times;) and that the defendant, before he would re-deliver the pawns, took and inſiſted upon the ſums mentioned in the declaration, over and above the principal; which the witneſs paid together with the principal, and received back his pawns. He proved no bond or aſſurance, or contract for uſury, at the time of the loan; or for repaying the money: nor was any ſuch additional ſecurity neceſſary; becauſe the pawn which was double the value of the debt, was the ſecurity, and was ſufficient to pay it, unleſs redeemed. He was croſs-examined: and after he had given his *whole* evidence, he was objected to as incompetent, (from what he had himſelf ſaid, without any evidence whatſoever on the part of the defendant,) becauſe the *repayment* of the money lent was not proved by *ſomebody elſe*. In ſtrictneſs, the objection came too late; after he had been ſworn in chief, examined, and croſs-examined. The ſtrictneſs of law, in this reſpect, is very wiſe, and ought to be more adhered to: for, the relaxation may be abuſed, and muſt always occaſion waſte of time. But I did not take it upon this foot "of the objection's coming "too late." I conſidered the objection as if it had been regularly made before he was examined in chief, and as if the whole of his evidence had come out upon the *voir dire*: and in giving our opinion now, we conſider it upon the *mere merits* of the objection, ſuppoſing it duly and regularly made. There is no caſe relative to the borrower's competence to be a witneſs upon a penal information againſt the uſurer, wherein either the pleadings are ſtated, or the facts of the caſe ſtated, or any argument by counſel or the bench reported. There is no caſe where the queſtion ever came before any Court in *Weſtminſter-Hall*, except in *Smith's* caſe, *Tr.* 8 *Jac.* 1, in *C. B.* upon a trial at bar. 2 *Ro. Abr.* 685. Title

tle "Trial," letter G. pl. 2. *Co. Litt.* 6. *b.* and many other books. Two reaſons are there given for univerſally rejecting the teſtimony of the borrower, 1ſt, Becauſe 'tis to be preſumed really his own cauſe, and that the nominal plaintiff is ſet up colourably by him: 2dly, Becauſe it would enable him to avoid his own ſecurities, and diſcharge himſelf of the money borrowed. The firſt reaſon is *now* totally *exploded*: for, he is not *now* preſumed to be the plaintiff in the cauſe. As to the ſecond—The propoſition laid down is too large. For, there may be uſury which cannot affect the debt, or avoid the contract. The clauſe that avoids the contract, is where the *contract* is for more than five *per cent.* But if a contract be for only five *per cent*; and the lender afterwards takes more, he is liable to be proſecuted for uſury, and to pay the penalty, though it does not avoid the contract. And where it would affect the debt, it may have been paid. All the other caſes are looſe notes of *ſayings*, or opinions at *niſi prius*; general aſſertions, general inferences, without particulars, without argument, without conſideration, without any ſtate of pleadings or facts. This queſtion having now come before the Court, it is neceſſary to conſider it with accuracy and preciſion. The objection to the competence of the witneſs can only be ſupported by arguing, either "that the event of this "penal proſecution in favour of the plaintiff will "*avoid* the bond, aſſurance, or contract of the witneſs, "and *diſcharge* him from the debt:" or, "that this "cauſe turns upon the *ſame* points and tranſactions "which, if proved in *another* cauſe, would avoid the "ſame." The foundation fails in both propoſitions: and the conſequence would not follow in the laſt, if the premiſes were true. No contract or aſſurance appears here for uſury; or ſo much as to repay the money. And if there was, the recovery of the penalty upon this information would not affect the contract. *The judgment in this action could not be given in evidence in an action for the debt; though the validity of the contract depended upon the ſame grounds as the information.* That might indeed be a prejudice, influence or bias upon the mind of the witneſs, and go to his *credit*: but not an actual intereſt, to go to his *competence.* This diſtinction has not been ſufficiently attended to at *ni-*

ſi

ſi prius: The caſes are contradictory; and it is impoſſible to reconcile them. The great deference to Lord Chief Juſtice *Holt's* opinion made the caſe of *The King* v. *Whiting*, (*a*) to be followed for ſome time: nay, Lord *Hardwicke* implicitly followed it in that of *The King* v. *Nunez*, (*b*) *P.* 9 *G.* 2. At that time there were many caſes both ways; a ſtring of both ſorts; (and amongſt the reſt, *Watt's* caſe, in *Hardres* 331, 332, "that in forgery, perjury, or uſury, the party grieved "ſhall not be admitted as a witneſs, becauſe he may re-"ceive a conſequential advantage from the verdict;" and *Parris's* caſe, in 1 *Ventris* 49, where ſuch a witneſs was admitted;) none of which caſes were conſidered or looked into. But ſince the caſe of *Whiting* and the caſe of *Nunez*, there has been great light thrown upon the diſtinction between INTEREST, which affects the *competence* of a witneſs; and INFLUENCE, which goes only to his credit. There have been the arguments and judgment in the caſe of *Rex* v. *Bray*, mayor of *Tintagel* (*c*) where Lord *Hardwicke* ſhook the authority of *Rex* v. *Whiting*; which he there, in effect, contradicts (though with guarded decency of expreſſion,) notwithſtanding his having before followed it in the caſe of *Nunez*. (*d*) Then came the caſe of *The Eaſt India Company* v. *Goſſen*. (*e*) There was alſo a caſe of *Baillie* v.

(*a*) 1 *Salk.* 283. (*b*) 2 *Str.* 1043.

(*c*) Firſt moved, on 26th October, 1736, argued in Hilary Term 1736, and determined on Friday, 11th February, 1736.

(*d*) Lord *Hardwicke's* words were, (as I took them in my note,) "If that caſe was ſtrictly examined, I be-"lieve it would appear that the objection in that caſe "went rather to the *credit* than to the competency of "the witneſs."

(*e*) *N. B.* This caſe was very fully diſcuſſed; and the opinion of all the judges taken. Lord Chief Juſtice *Lee* held the objection to go to the competency: So did Mr. Juſtice *Deniſon*. But Lord Chief Juſtice *Willes*, Lord Chief Baron *Parker*, *Reynolds*, *Abney*, *Burnet* and *Wright*; "that it went to the CREDIT *only*." A new trial was therefore ordered, on Friday, 13th May, 1743, *Tr.* 16 & 17 *G.* 2.

Wilſon,

Wilſon, (about the proof of a will,) before the delegates; who were *equally divided* "whether the objection ſhould go to the *competence* or *credit* of the only witneſs who proved a *codicil*, ſubſequent to a ſecond will, *ſetting up again* the firſt will;" and therefore no ſentence was given. Thereupon a commiſſion of adjuncts iſſued: a majority of whom (Mr. Juſtice *Denis ſon* being one) held "that it went only to the *credit*;" and ſentence was given for the firſt will. Upon a petition for a commiſſion to review, it was fully argued: and Lord *Hardwicke*, on 15 *Jan.* 1744. gave a ſolemn opinion with the majority of the adjuncts, "that the witneſs having adminiſtered under the firſt will as agent to the executor, or as executor *de ſon tort*, and being liable to actions, the objection went only to the *credit*, not to the competency." The ſolemn diſcuſſion in theſe three caſes drew the line between INTEREST, which goes to the competence; and INFLUENCE, which goes to the credit, more clearly than had before been underſtood. It eſtabliſhed a rule, "*that where the matter was doubtful, the objection ſhould go to the credit.*" It eſtabliſhed, "*that the queſtion in a criminal proſecution being the ſame with a civil cauſe in which the witneſs was intereſted, went generally to the credit; unleſs the judgment in the proſecution where he was a witneſs could be given in evidence in the cauſe where he was intereſted.*" I ſay "*generally*;" (becauſe all rules of evidence admit of exceptions. After theſe caſes, in that of *Rex* v. *Broughton* in 1745. (*f*) Lord Chief Juſtice *Lee* over-ruled the three caſes of *Rex* v. *Whiting* (*g*) *Rex* v. *Nunez*, (*h*) and *Rex* v. *Ellis*, (*i*) which opinion of his has been followed ſince, and approved. There has been a remarkable caſe ſince I left the bar, in *Trinity Term* 32 & 33 *G.* 2. *Bartlett* v. *Pickerſgill*. The defendant bought an eſtate for the plaintiff: there was no writing, nor was any part of the money paid by the plaintiff. The defendant articled in his own name, and refuſed to convey, and by his anſwer denied any truſt. Parol evidence was rejected; and the bill was diſmiſſed. The defendant was af-

(*f*) 2 *Str.* 1229.
(*g*) 1 *Salk.* 283.
(*h*) 2 *Str.* 1043.
(*i*) 2 *Str.* 1104.

terwards indicted for perjury; tried at *York*; and convicted upon evidence of the plaintiff, confirmed by circumſtances and the defendant's declarations. The plaintiff then petitioned for a ſupplemental bill in nature of a bill of review; ſtating this conviction; but the petition was diſmiſſed, becauſe, the conviction was not evidence, 22d November, 1762. This reaſoning ſhews too, that, if it was neceſſary, the witneſs was competent to be heard, as to the debt being paid: the recovery could not be evidence. What he ſwore, could not be evidence in an action for the debt. There is no danger of perjury, from hearing him. The defendant may produce the ſecurity, and falſify him. If (as here) it is the caſe of a pawn, the witneſs would ſwear againſt his own intereſt to ſay untruly, "the debt was paid, and the pledge returned." But, *either* way, the debt is paid; for, unleſs the pledge be redeemed, it is a ſatisfaction.

Suppoſe a witneſs produces a bond or note or mortgage cancelled—Suppoſe he produces a receipt—There can be no danger in hearing him: For, the jury are not bound to believe him. That depends on circumſtances, which may contradict or ſupport his teſtimony. But if it be neceſſary to prove payment, and the party is not to be heard as a witneſs to prove ſuch payment, the ſtatute would be as effectually repealed as if the borrower could never be a witneſs at all: For, they never would ſuffer any body elſe to be privy to the payment, delivering up, or cancelling the ſecurities. But to go further—All objections to the competence of the witneſs muſt either be *proved*, or drawn from him upon a *voir dire*; or to take it in the utmoſt latitude, upon his *examination*. Here was no proof of any objection, or of any debt remaining. The witneſs ſwore, "that he ſhould neither gain nor loſe by the event of the cauſe;" in every ſhape in which the queſtion could be put: and he ſhews it, by giving an account of the debt being paid. He ſwore upon a *voir dire*, "that it was paid." Had the defendant produced a ſecurity, or proved the pledge to be remaining in his cuſtody, it would have been a different conſideration, "Whether the witneſs, who was the borrower of the money, could be examined to contradict this." But when the whole ground of the objection comes from himſelf

himſelf only, what he ſays muſt be taken together, as he ſays it, and then the debt is paid.

In every light, we are all of opinion, "that, under all the circumſtances of this caſe, *Benjamin Abrahams was* a *competent* witneſs; and conſequently the rule ought be diſcharged.

Rule diſcharged.

Smith qui tam v. Prager. 7 *T. Rep.* 60.

In an action for uſury the borrower of the money is a competent witneſs to prove the whole caſe.

THIS was an action for uſury, tried before Lord *Kenyon*, C. J. at *Guildhall*. In order to prove the caſe, *Bromer* the borrower of the money was called as a witneſs; and he gave in evidence that on the 17th of *September*, 1795, he borrowed of the defendant 900l. to be repaid on the 3d of *October* following, for which he was to pay 11l. as intereſt. That on the 13th *October*, 1795, he borrowed of the defendant 2000l. more to be repaid on the 26th of the ſame month, for the loan of which he was to pay 42l. and both the principal ſums and intereſt were repaid at the ſtipulated time by *Bromer's* drafts on his banker, which were duly honoured. That he was ſtill indebted to the defendant in the ſum of 4000l. on a running account for this and other loans of money. *Bromer* had before the trial become a bankrupt, and had not obtained his certificate. It was objected at the trial that he was not a competent witneſs, on the ground of intereſt; but Lord *Kenyon*, C. J. over-ruled the objection, and the plaintiff obtained a verdict on the counts, ſtating the two tranſactions above mentioned, there being other uſurious tranſactions ſtated in other counts which were not proved.

A rule having been obtained on a former day, calling on the plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial had on this ground, the Court diſcharged that rule.

Lord KENYON, C. J.—The caſe of *Bent* v. *Baker* laid down a clear and certain rule by which I have ever ſince endeavoured to regulate my opinion in cauſes coming before me at *Niſi Prius*, though probably I may not have decided properly in every inſtance, when called

called upon to form an opinion on the ſudden. The rule there laid down was, that no objection could be made to the competency of a witneſs upon the ground of intereſt, unleſs he were directly intereſted in the event of the ſuit, or could avail himſelf of the verdict in the cauſe, ſo as to give it in evidence on any future occaſion in ſupport of his own intereſt. We are now called upon to review that deciſion; and the caſe of *Abrahams* v. *Bunn* has been cited. The report of the latter in *Burrow* is a very full one, but I have a MS. note of it ſomething fuller. Lord *Mansfield* there ſtated the great doubt and contradiction which had long prevailed in the caſes upon the diſtinction between objections which went to the competency and ſuch as went to the credit only of a witneſs. That the Courts had long been miſled by the authority of Lord *Holt* in deciding the caſe of the *King* v. *Whiting*, (*k*) where upon an indictment for a cheat in obtaining a perſon's ſubſcription to a note of 100l. inſtead of 5l. he rejected the evidence of the maker of the note; becauſe if the defendant were convicted, Lord *Holt* ſaid the verdict would be ſure to be heard of in an action on the note to influence the jury. That this deciſion was followed by Lord *Hardwicke* in the *King* v. *Nunez*; (*l*) but that in the *King* v. *Bray*, (*m*) his Lordſhip had an opportunity of reviewing his own opinion and that of Lord *Holt*, and was then ſatisfied that the objection went only to the credit and not to the competency of the witneſs; and that as to *hearing of the verdict*, he ſitting as a judge could only hear of it judicially, and if it could not be afterwards given in evidence for the witneſs, it was no objection to his competency. Lord *Mansfield* alſo obſerved that ſince the *King* v. *Whiting*, great light had been thrown upon the ſubject by three decided caſes; thoſe of *R.* v. *Bray*, the *Eaſt India Company* v. *Goſſen*, and *Baillie* v. *Wilſon* before the delegates. And he laid it down as a rule that the objection to a witneſs on the ground of future intereſt only went to his credit, unleſs the judgment could be given in evidence for him in any other ſuit. Now that was the very point decided in *Bent* v. *Baker*, and therefore the authority of

(*k*) *Salk.* 283.
(*l*) 2 *Stra.* 1043.
(*m*) *Rep. temp. Hard.* 358.

that

that caſe ſtands fully confirmed. Upon the authority therefore of all theſe caſes I am clearly of opinion that *Bromér* was a competent witneſs in this caſe: and that the objection to the ſituation in which he ſtood went only to his credit, of which the jury alone were to judge.

The other Judges aſſenting,

Rule diſcharged. (*n*)

(*n*) Vid. *Bell* v. *Harwood*, 3 vol. T. R. 308. S. P.

No.

No. 4.

MSS. CASES CITED, THE NOTES WHEREOF ARE NOT CONTAINED IN THE BODY OF THE WORK.

The king againſt the inhabitants of Hammerſmith. K. B. Sittings at Weſtminſter after Hil. Term, 1776. (p. 9.)

ON a preſentment for not repairing a road in the hamlet of Hammerſmith,

Joſeph Fitch, a witneſs for defendants, proved what an old man, now dead, had told him twenty years ago, about the boundaries of the pariſh of Acton and hamlet of Hammerſmith; but the old man who told him was at that time an inhabitant of the hamlet: On which Mr. *Bearcroft* objected that this was not evidence, becauſe the perſon who ſaid it was intereſted at the time. But

Lord Mansfield ſaid it was good evidence, for at that time there was no queſtion or diſpute about the matter, and it could not be ſuppoſed a man held a converſation for the chance of a diſpute in order to make it evidence twenty years afterwards.

Doe dem. Powell v. Harcourt, K. B. Sittings at Weſtminſter after Eaſter Term, 39 Geo. 3. (page 55.)

EJECTMENT for a piece of land ſituate in the pariſhes of *St. Leonard, Shoreditch, and St. Luke, Old Street*, in the county of *Middleſex*.

The leſſor of the plaintiff claimed this land under the will of her late huſband, Mr. Moffat, who derived title from a family of the name of Radcliffe. Their title commenced by deeds of leaſe and releaſe, dated 1ſt and

2d

2d Feb. 1696, between James Richardſon and John Radcliffe, whereby a certain piece of land called the *Iriſh Acre* was conveyed to Radcliffe in fee, which land was deſcribed as abutting on a piece of land called the *Harpe*. The plaintiff alſo proved receipt of rent by Moffat, her late huſband, an old plan delivered by the defendant to the governors of St. Bartholomew's Hoſpital, in which the *locus in quo* was deſcribed as part of Moffat's eſtate, and that unleſs this land was not the plaintiff's, ſhe had no land abutting on the *Harpe*; and that the Prebendary of the Moor of St. Paul's, as leſſee of whom the defendant claimed, had without it 18 acres 2 roods. She then produced in evidence a ſurvey taken in 1649, by virtue of an ordinance of the Parliament, which was entitled as follows:

"A ſurveye of certaine parcells of meadowe and paſture grounde in the countye of Middleſex, late belonginge to the Prebendary of the Moore with the Cathedrall Church of S. Paul's, London, made and taken by us whoſe names are hereunto ſubſcribed, in the month of October, 1649, by virtue of a commiſſion to us granted, grounded upon an act of the Commons of England aſſembled in Parliament, for the aboliſhing of deans, and deans and chapters, canons, prebends, and other offices and tytles of and belonging to any cathedral, or collegiate church, or chapel in England and Wales, (*a*) under the hands and ſeals of five or more of the truſtees in the ſaid act named and appoynted."

"All thoſe 18 acres of lands, &c." The lands were then particularly ſpecified, and all together amounted to the exact number of 18 acres.

The defendants attempted to account for the poſſeſſion of the Radcliffe and Moffat families, by ſhewing that for many years they held the church lands in leaſe, and contended, that they being alſo poſſeſſed of other eſtates of their own adjoining and intermixed, encroachments had been made by them upon the prebendal eſtate, and that in point of fact, this was not part of their freehold eſtate, but part of the land of the Prebendary of the Moor.

Lord KENYON.—The defendant cannot contradict the parliamentary ſurvey, it has always been conſidered

(*a*) See this act in *Scobell's* collection, 2d part, p. 16.

as

as concluſive. By the deeds of 1696, this property is deſcribed to be in the ſame poſture as that in which it now remains, viz. as abutting upon the *Harpe*, and it appears that if this is not the land in queſtion, the leſſor of the plaintiff will have no land ſo abutting. The parliamentary ſurvey taken by thoſe who were then in poſſeſſion of the church property, deſcribes it with the utmoſt particularity, and the quantity of which the Prebendary of the Moor is now poſſeſſed agrees with this deſcription. This is a very ſtrong argument in favour of the leſſor of the plaintiff; for the perſons who then held the reins of Government, and ſeized the church lands, wiſhed to make the moſt of them, and would not have deſcribed them as of leſs extent than they really were.

Verdict for Plaintiff.

Gibbs, *Wood* and *Peake*, for plaintiff.
Erſkine, *Garrow* and *Beſt*, for defendant.

Keeling v. Ball K. B. Sittings at Guildhall, after Eaſter Term, 36 *G.* 3, (*page* 65.)

DEBT on bond for £200. made by *John Ball*, the brother of the defendant, and to whom he was heir at law.

The declaration ſtated, that the bond was loſt by accident. Pleas *non eſt factum*, & *ſolvit ad diem*.

The plaintiff called a witneſs of the name of *Ruſſel*, who proved that the plaintiff had delivered him a bond, purporting to be the bond of *J. Ball* and *Edward Ball*, and that he afterwards applied to the deceaſed (*J. Ball*,) to pay the money due on the bond, when he acknowledged the debt and promiſed payment. He ſaid the bond was printed *in the common form*, (*b*) and that there were ſubſcribing witneſſes names, but that he did not know the names of thoſe witneſſes, nor by whom the bond was prepared. That he afterwards delivered the bond to *Carter*, the attorney, for the purpoſe of commencing an action againſt the deceaſed. *Carter* was next called, and proved that the bond was loſt, while in his office.

(*b*) Which includes the word *heirs*.

GIBBS,

GIBBS, for the defendant, objected that the plaintiff should have called one of the ſubſcribing witneſſes to prove the execution of the bond, or elſe have ſhewn that ſuch witneſs was dead. It had for a long time been doubted, whether ſuch a mode of pleading as the preſent, could be ſupported; (c) and Courts ſhould not carry the indulgence too far. The plaintiff, in this caſe, might be in a better ſituation by reaſon of the negligence of his agent, than he would have been in, had due diligence had been uſed: for had the ſubſcribing witneſs been called, the defendant might croſs-examine him as to the nature of the tranſaction. The attorney, *Carter*, he contended, had been guilty of ſome negligence; for he might have kept a copy of the bond; and had that precaution been taken, the ſubſcribing witneſs might have been called.

LORD KENYON, ſaid, that had it appeared who the ſubſcribing witneſſes were, the plaintiff muſt certainly have called them, but that it was the buſineſs of Courts of Juſtice, to apply the general principles of the law to new caſes as they ariſe. This was a new caſe, for it did not appear that the plaintiff could, by any poſſibility, know who the ſubſcribing witneſſes were. If it was uſual for men to keep copies of ſuch inſtruments by them, the plaintiff's attorney, *Carter*, would certainly have been guilty of negligence, and the plaintiff could not avail himſelf of that negligence; but that was not the ordinary mode in which men conducted themſelves. Suppoſe a fire had happened, and this bond had been deſtroyed by it, ſurely it would be adding calamity to calamity to call on the party for more perfect evidence, and how could this caſe be diſtinguiſhed from that. The general rule of law is, that the beſt evidence muſt be produced, which the nature of the caſe will admit of; and no better evidence could have been procured in the preſent caſe, than that which the plaintiff has given.

Verdict for Plaintiff.

Carrow and *Abbot*, for plaintiff.

(c) Vide *Reed* v. *Brookman*, 3 *T. Rep.* 151.

Cary v. Pitt, Esq. K. B. Sittings at Westminster after Easter Term, 37 G. 3. (page 71 & 74.)

ASSUMPSIT on a bill of exchange, (drawn by one *Croſton,*) againſt the defendant as acceptor. The defendant inſiſted that the acceptance was a forgery; and, among other evidence, the plaintiff called a witneſs of the name of *Coulſon*, who was an inſpector of franks at the Poſt Office, to prove that he had frequently ſeen franks paſs the Office in defendant's name (he being a member of Parliament,) and that from the character in which thoſe franks were uſually written, he believed this acceptance to be the defendant's hand-writing. He had never ſeen the defendant write, nor received any letters from him.

LORD KENYON ſaid this was not admiſſible evidence. The furtheſt extent to which the rule had been carried, was to admit a perſon who had been in the habit of holding an epiſtolary correſpondence with the party, to prove the hand-writing, from the knowledge he acquired in the courſe of that correſpondence; a caſe reported by *Fitzgibbon*, (a) was the firſt in which ſuch evidence was admitted. That evidence was admitted on ſound principles; for if, where letters are ſent, directed to a particular perſon on particular buſineſs, an anſwer is received in due courſe, it is a fair preſumption, that the anſwer was written by the perſon, whoſe hand-writing it purports to be; but the franks ſent to the office might be the defendant's hand-writing, or they might be forgeries, as well as the preſent; for no communication was had on the ſubject with the defendant.

GARROW then aſked the witneſs, whether, having been uſed to detect forgeries, he could ſay whether this was a genuine hand-writing, or otherwiſe.

LORD KENYON ſaid, he could not receive this, and obſerved that, though ſuch evidence was received in *Revett* v. *Braham*, he had, in his charge to the jury, laid no ſtreſs upon it.

Verdict for the defendant.

Erſkine, for defendant.

(a) *Lord Ferrers* v. *Shirley*, *Fitzg.* 195.

Da Costa v. Pym. K. B. Sittings at Guildhall, after Trinity Term, 37 G. 3. (page 72.)

DEBT on bond—Plea uſury.

The proof of the uſury depended on the authenticity of an account purporting to be ſigned by the plaintiff. The plaintiff contended it was a forgery, which was the only queſtion in the cauſe.

Several witneſſes were called to prove the hand-writing, who ſaid, they believed it to be the plaintiff's; one witneſs, on being aſked the uſual queſtion as to his belief, ſaid it was like it; but he did not think it was the plaintiff's hand-writing, becauſe he knew the plaintiff to be a man too well acquainted with the world to ſign ſuch an account.

ERSKINE contended this anſwer was proper, and that it was like the caſe which aroſe on the hand-writing of *Mr. Mickle*, the tranſlator of the Luſiad; *Mr. Caldecot* in that caſe was permitted to ſay, he thought it was not the hand-writing of *Mr. Mickle*, becauſe he was a very correct man in making capital or ſmall letters, where each was required, but in the writing produced, that correctneſs was not obſerved.

Lord KENYON ſaid, that was a very different caſe from the preſent. *Mr. Caldecot's* obſervations aroſe from the *character of the hand-writing itſelf*, but this witneſs takes into his conſideration facts entirely unconnected with and extrinſic from the hand-writing. The jury may take all circumſtances into their conſideration, but the witneſs ſhould form his opinion from the character of hand-writing only.

Several notes, &c. ſigned by plaintiff were produced to the jury, but Lord *Kenyon* ſaid the beſt rule was that laid down by *Mr. J. Yates*; (*a*), for if the Jury were to look at the papers, their judgment would depend on their knowledge of writing, which ſome might know better than others; it was beſt to rely on the evidence of thoſe well acquainted with the character of defendant's hand-writing. The jury never-

(*a*) In *Brookhard* v. *Woodley*, ante.

theleſs

theleſs were permitted to compare the different ſignatures.

Verdict for Plaintiff.

Mingay, *Gibbs*, and *Cooper*, for defendant.
Erſkine and *Wood*, for plaintiff.

Raven & al. v. Dunning and Chilton. K. B. Sittings at Guildhall, after Trinity Term, 39 G. 3.

IN this action of aſſumpſit both the defendants pleaded the general iſſue, and *Chilton* alſo pleaded his diſcharge under a commiſſion of bankruptcy, on which iſſue was joined. The plaintiff proved a joint contract, and then the defendant, *Chilton*, put in the commiſſion againſt him and his certificate, which *Law*, for the defendants, contended entitled *Chilton* to a verdict immediately; and, that when that verdict was entered, he might be examined as a witneſs for the other defendant in the ſame manner as was daily done in the caſe of treſpaſſes.

ERSKINE for the plaintiffs, objected to his teſtimony. While defendant on the record, he cannot be a witneſs; and he cannot be delivered from the record until the plaintiff's counſel has replied, and the Jury have deliberated; for aught that appears to the contrary, the plaintiff may prove that the certificate was obtained by fraud, or that he had loſt money by gambling, or other miſconduct which would avoid it. This differs from the caſe of treſpaſſes, for here the plaintiff muſt prove a a joint contract; and even in treſpaſſes, the Jury are never directed to acquit a defendant, unleſs the plaintiff has failed in making out any caſe againſt him.

LORD KENYON ſaid, he wiſhed to admit the teſtimony, for the ſake of the plaintiffs (who had clearly proved their caſe,) leſt, in caſe of a miſtake on his part, the cauſe ſhould come down again, but that if the plaintiff's counſel inſiſted on their objection, he muſt reject his evidence, being moſt clearly of opinion in his own mind, that he could not be a witneſs. In treſ-

paſs,

paſs, if the plaintiff proves any caſe, the defendant has always been called upon to anſwer it by other evidence.

ERSKINE perſiſted in his objection, and the witneſs was rejected.

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